REPORTS

OF

C A S E S

ARGUED AND ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

IN FEBRUARY TERM, 1809.

VOL. V.

BY WILLIAM CRANCH,
Chief Judge of the Circuit Court of the District of Columbia.

POTIUS IGNORATIO JURIS LITIGIOSA EST, QUAM SCIENTIA.
CIC. DE LEGIBUS, DIAL. I.

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DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, that on the fifth day of February, in the thirty-seventh year of the Independence of the United States of America, ISAAC RILEY, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

"Reports of Cases argued and adjudged in the Supreme Court of "the United States, in February term, 1809 Vol. V by WILLIAM "CRANCH, Chief Judge of the Circuit Court of the District of Co-"lumbia. Potius ignoratio juris litigiosa est, quam scientia.
"Cic de legibus, dial. i."

IN CONFORMITY to the act of Congress of the United States, entitled, "An act for the encouragement of learning, by securing the "copies of maps, charts and books, to the authors and proprietors of "such copies, during the times therein mentioned;" and also to an act, entitled, "An act, supplementary to an act, entitled, an act for "the encouragement of learning, by securing the copies of maps, "charts and books, to the authors and proprietors of such copies, du-"ring the times therein mentioned, and extending the benefits thereof "to the arts of designing, engraving and etching historical and other "prints."

CHARLES CLINTON,
Clerk of the District of New-York.

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ERRATA.

Page 10 line 27, for "*of* ground" read *or* ground.
12 16, for "*his* counsel" read *the plaintiff's* counsel.
113 24, for "decisions" read *decision.*
137 last line for, "1799," read 1779.
139 line 37, for "*was* unnecessary" read *is* unnecessary.
170 19, for "*the* description" read *one* description.
183 15, for "*de*fence" read offence.
191 9, after the opinion of the court, in the case of *The Marine Insurance Company of Alexandria* v *Young*, insert the following opinion of Judge Johnson, which was mislaid and omitted to be inserted in its proper place.

JOHNSON, J "My object in expressing my opinion in "this case, is to avoid having an ambiguous decision here-"after imputed to me, or an opinion which I would not "wish to be understood to have given.

"I decide against the appellant on the first point, because "an examination of a witness, taken under commission, "cannot possibly be considered written evidence, as the "counsel have contended it is; nor is the meaning of "a witness, words for the court to determine; but strictly "within the province of the jury.

"I decide against the appellant on the second ground, be-"cause I am of opinion that no appeal lies to this court "from the decision of a circuit court on a motion for a "new trial."

230 line 16, for "*northern*" read *southern.*
240 10, for "*preserved*" read *presumed.*
248 4, for "*principal*" read *principle.*
289 4, for "Rodford, read Radford.
295 21, read "members" *must* "concur."
344 21, of margin, between "*is*" and "*of*" insert *out.*

SUPREME COURT U. S.

FEBRUARY TERM, 1809.

THE UNITED STATES *v.* WEEKS.

THE UNITED STATES v. WEEKS.

THE writ of error in this case was dismissed by the assent of the attorney-general, it having been issued from this court directly to the *District* Court for MAIN *District;* whereas by the 10*th* sect. of the judiciary act of 1789, *vol.* 1. *p.* 55. writs of error lie from decisions in that court to the circuit court of Massachusetts in the same manner as from other district courts to their respective circuit courts; notwithstanding that the district court of Main has all the original jurisdiction of a circuit court.

A writ of error does not lie directly from the supreme court of the U. States to the district court of the district of Main, altho' the latter has all the original jurisdiction of a circuit court.

CHARLES ALEXANDER *v.* THE MAYOR AND COMMONALTY OF ALEXANDRIA.

ERROR to the circuit court of the district of Columbia, sitting at Alexandria, to reverse a judgment of that court rendered against the plaintiff in error *on motion*, for taxes due to the defendant in error for paving the streets in Alexandria.

The corporation of Alexandria has power to tax the lots and lands of non-residents. It is not neces-

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sary that the lots should be *half-acre* lots.

Those taxes cannot be recovered by *motion*, unless in the case of a person holding land, who has no other property in the town.

A bill of exceptions stated that the plaintiff below produced and read to the court the following acts of the general assembly of Virginia, viz. "An act for incorporating the town of Alexandria in the county of Fairfax, and the town of Winchester in the county of Frederick," passed October 4th, 1779, by which it is enacted that "The mayor, recorder, aldermen and common councilmen shall have power to erect and repair work-houses, houses of correction, and prisons and other public buildings for the benefit of the said town; and to make by-laws and ordinances for the regulation and good government of the said town," not repugnant, &c. ("and to assess the *inhabitants* for the charge of repairing the streets and highways,) to be observed and performed by all manner of persons residing within the same, under reasonable penalties and forfeitures, to be levied by distress and sale of the goods of the offenders for the public benefit of the said town."

Also the act of 1786, "To extend the limits of the town of Alexandria," by which it is enacted that the limits of that town "shall extend to and include as well the lots formerly composing the said town as those adjoining thereto which have been and are improved."

Also the act of December 16th, 1796, "Concerning the town of Alexandria," by which it is enacted "That it shall and may be lawful for the mayor and commonalty of the town of Alexandria to recover of and from all and every person or persons holding land within the limits of the said town, *and who have no other property within the said town on which the taxes or assessments imposed on such property for paving the streets therein can be levied*, the amount of such taxes or assessments *by motion* in the court of the county or corporation where such person or persons reside; provided that such person or persons have ten days' previous notice of such motion, and the amount of the taxes or assessments due from him, her or them. And provided also that nothing herein contained shall be so construed as to empower the court to give judgment against any person or persons residing out of the limits of the corporation

of Alexandria, and owning ground therein, having no house on it, where the service (to compensate which the tax or assessment has been or may be imposed) has been or may be performed before the last day of February, 1797; but for the collection of such taxes, the same means may be used which would have been lawful before the passage of this act."

Also the act of 13th of December, 1796, "Adding to the town of Alexandria certain lots contiguous thereto, and for other purposes therein mentioned," the preamble of which recites, that "Whereas several additions of lots contiguous to the town of Alexandria have been laid off by the proprietors of the land, in lots of half an acre each, extending to the north, to a range of lots upon the north side of a street called Montgomery; upon the south, to the line of the district of Columbia; upon the west, to a range of lots upon the west side of West street; and upon the east, to the river Potomac; that many of the lots in these additions have already been built upon, and many more will soon be improved; and whereas it has been represented to the general assembly that the inhabitants, residing on the said lots, are not subject to the regulations made and established for the orderly government of the town, and for the preservation of the health of the inhabitants, by the prevention and removal of nuisances, upon which their prosperity and well being do very much depend,"

Be it therefore enacted, that each and every lot or part of a lot within the limits aforesaid, on which at this time is built a dwelling-house of at least sixteen feet square, or equal thereto in size, with a brick or stone chimney, and that each and every lot within said limits which shall hereafter be built upon, shall be incorporated with the said town of Alexandria, and be considered as part thereof."

Also an act "Extending the jurisdiction of the mayor and commonalty of the town of Alexandria, and for other purposes," the preamble whereof recites, that "Whereas by an act of assembly passed in the year 1796, entitled, *an act adding to the town of Alexandria certain lots contiguous thereto, and for other purposes therein mention-*

ed, it is enacted that certain improved lots, and all others as they become so improved, within the bounds in the said act mentioned, be added to, and made part of, the said town of Alexandria, thereby leaving out of the jurisdiction of the mayor and commonalty of the said town, the unimproved lots within the limits aforesaid, as long as they shall so remain unimproved; by which means the prosperity of the said town is in a great degree prevented,

SECT. 1. "*Be it therefore enacted*, That the unimproved lots within the limits aforesaid shall be and are hereby incorporated with and considered as a part of the said town of Alexandria, and subject to the same regulations as the other parts thereof.

SECT. 2. "The mayor and commonalty of the said town are hereby authorized and empowered, whenever they may deem it proper, to open, extend, regulate, pave and improve the streets of the said town; *provided*, *however*, that they shall make to every person or persons injured by the extension of any of the said streets, such compensation, out of the funds of the corporation, as to the said mayor and commonalty shall appear to be just."

The plaintiffs produced also the necessary by-laws and documents to show the regularity and amount of the assessment.

On the part of the defendant it was proved that he never was an inhabitant of the town of Alexandria—that the property assessed was not within the original limits of the town, but lies within the limits described by the act "Adding to the town of Alexandria certain lots contiguous thereto, and for other purposes."

It was not proved that the defendant had ever laid off any part of the property into lots of half an acre each, or in any other manner, or that he had ever built any dwelling-house thereon. But it was proved that always after the assessment the *defendant had personal property within the town, on which*

the assessments could have been levied; (but it did not appear that the personal property had been on any of the lots assessed;) and that the serjeant of the town informed the mayor and common council, that he could make distress on the defendant's personal property in the town of Alexandria, for the assessments.

The property assessed was part of a tract of land which the defendant holds in the neighbourhood of the town. The commissioner of the streets of the town had been directed by the mayor to make a plan of the town, and had applied to the defendant to know whether he did not wish to have the plan extended on his land which lay adjoining the town on the north, to which the defendant replied that he wished to have four streets and four ranges of squares laid off through his land; and being requested to name the streets, he called them Pendleton, Wythe, Madison and Montgomery, by which names they were designated on the plan; and the defendant had sold or let lots agreeably to the plan, and designated as bounded by those streets. Some of those streets were actually laid out, and the corners designated by stakes and stones at the request of individuals. On the plan the defendant did not designate any smaller quantity of ground than regular squares of two acres each, agreeably to the manner in which the town was laid off by the act for establishing the same.

The property assessed laid within the four new ranges of squares above mentioned, and the defendant had by several deeds sold and conveyed several squares and parcels of land less than two acres within those four ranges of squares.

C. Simms, for plaintiff in error, contended, 1st. That the land was not liable to be taxed until it was laid off into half-acre lots, and that it had never been so laid off, although it had been laid off into two acre squares.

2d. That the corporation had power to assess *inhabitants* only; and,

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3d. That there cannot be a judgment upon motion, because there was always personal property of Mr. Alexander in the town which might have been distrained for the taxes.

Swann, contra.

The corporation has power to make all by-laws for the good government of the town, and not repugnant to the general laws of the state. This included the power to order and provide for the pavement of the streets, and to raise taxes for that purpose, by assessments on the persons and property within the town.

The acts of the 13th and 16th December, 1796, clearly recognise the power to tax the property of non-residents.

It was unnecessary to lay out the half-acre lots. The squares were regularly divided into four lots each by ideal lines.

The mode of collecting the taxes by distress and sale of personal property, was only a cumulative remedy. The corporation was not bound to resort to it. It was a more severe and harsh manner of proceeding than that by notice and motion, especially as the principal object of both parties was to try the right of the corporation to tax the property.

February 8.

MARSHALL, Ch. J. delivered the opinion of the court, as follows, viz.

In the proceedings in this cause two errors are assigned by the plaintiff.

1st. That the corporation had no power to assess the tax for which the judgment was rendered.

2d. That the judgment is irregular, because rendered on motion.

Both these points are to be decided by the several acts of the legislature of Virginia respecting the town of Alexandria.

In support of the first it is contended,

1st. That the corporation has no power to tax property not belonging to an inhabitant of the town; and Charles Alexander was not an inhabitant.

2d. That the property, on which this tax was assessed, was not within the corporation.

The words of the act of 1779, which is the first act shown to the court that confers the power of taxation, are these "The mayor, recorder, aldermen and common councilmen shall have power to erect and repair work-houses, houses of correction and prisons, or other public buildings, for the benefit of the said town; and to make by-laws and ordinances for the regulation and good government of the said town; provided such by-laws or ordinances shall not be repugnant to, or inconsistent with, the laws and constitution of this commonwealth, and to assess the inhabitants for the charge of repairing the streets and highways."

For the plaintiff it is contended that the power of taxation, here given, is, in terms, confined to assessments made on the inhabitants. On the part of the defendants it is urged that the express power to assess the inhabitants is for the sole purpose of improving their streets, and that an express power is also given to make expensive establishments, the means of erecting which could be furnished only by taxes; that the power to make by-laws must therefore necessarily be construed to involve the power of taxing, at least for these objects.

Without deciding this question as depending merely on the original law, it is to be observed that acts *in pari materia* are to be construed together as forming one act. If in a subsequent clause of the same act provisions are introduced, which show

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the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law.

The act of the 16th of December, 1796, contains this clause: "It shall and may be lawful for the mayor and commonalty of the town of Alexandria to recover, of and from all and every person or persons *holding land* within the limits of the said town, and who have no other property within the said town on which the taxes or assessments imposed on such property for paving the streets therein can be levied, the amount of such taxes or assessments, by motion in the court of the county or corporation where such person or persons reside."

This clause most obviously contemplates a full right to assess taxes on property lying within the town and belonging to non-residents; for it gives a right to recover such assessment in the court of any county or corporation in which the owner of such property may reside. It is either a legislative exposition of a power formerly granted, or the grant of a new power.

If the words of the enacting clause could admit of doubt, the proviso would remove that doubt. It is that the clause which has been recited should not "be so construed as to empower the court to give judgment against any person or persons, residing out of the limits of the corporation of Alexandria, and owning ground therein, having no house on it, where the service, to compensate which the tax or assessment has been or may be imposed, has been or may be performed before the last day of February, 1797; but for the collection of such tax the same means may be used which would have been lawful before the passage of this act."

This proviso shows, as clearly as words can show, the sense of the legislature in favour of taxing the land of non-residents.

The same act appears to the court to remove any doubt, which might otherwise exist, respecting the second branch of this question.

Upon a critical examination of the act of the 13th of December, 1796, the court would feel much difficulty in declaring that it comprehended in the corporation of Alexandria only that ground which was actually divided into half-acre lots, and the court would be the less inclined to take this distinction, because no inducement for making it is to be found in the nature of the thing, or could have existed with the legislature.

The preamble states the lots, represented as contiguous to the town of Alexandria, to have been laid off by the proprietors, in lots of half an acre each, within certain limits which are described by the law. The enacting clause drops the quantity of which a lot is to consist, and declares that every lot, or part of a lot, within the limits described, which had been or should be improved, should be made part of the town of Alexandria. The act of 1798 annexes to the town all the unimproved lots within those limits. The case finds that the property on which the tax for which the judgment is rendered was imposed, is within those limits, and was laid off as part of the town in squares of two acres, but these squares were not actually subdivided into half-acre lots.

The term half-acre used in the preamble of the act of 1796 is a description of a circumstance probably contained in the representation on which the law was founded. But it is impossible to consider that part of the representation as material to the law. If the squares were regularly laid out, the subdivisions of those squares were unimportant, for that subdivision would always depend on the caprice of purchasers and sellers. Lots and parts of lots might

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be separated, or annexed to each other, at will. The enacting clause, therefore, of the first act, comprehends every lot, or part of a lot, within the described limits, which had been or should be improved; and the enacting clause of the act of 1798 comprehends every lot within those limits. That a square comprehended in those limits, laid off as part of the town, and containing precisely four half-acre lots, should be considered as excluded from the town, and not liable to taxation for the improvement of the streets, for the single reason that the proprietor had not marked thereon the lines of subdivision, would not be readily conceded.

But if a doubt respecting the sense of the legislature could otherwise be entertained, that doubt is removed by the act of the 16th of December, 1796, already recited, which particularly respects the power of taxation, and gives the remedy by motion.

That act drops the term "lot," and uses the term "land." It authorizes the corporation to recover by motion against any person "holding *land* within the *limits* of the town" "the taxes or assessments imposed thereon." The proviso, which has been also recited, uses the term "ground," and considers every person owning *ground* within those limits as liable to be taxed. The 3d section of the same act declares, "that when the proprietor of any lot of *ground* within the said town shall fail to fill up any pond of water, or remove any nuisance," as directed by the corporation, the mayor and commonalty may exercise corporate powers in the case. If the squares in question do not consist of lots, because the subdivisions have not been actually marked, yet they consist of *land*, they consist of *ground*, and being within the limits of the town, they are, in the opinion of the court, within the corporation, and subject to taxation.

But the remedy in the actual case is not by motion. The act affording this remedy gives it only in a specified case. It is given only in the case of "a person or persons holding land within the limits of

the said town, and who have no other property within the said town." This is not, as has been said, a direction to the officer of the corporation, but is a description of the precise case in which alone the remedy by motion is allowed. It being found that Charles Alexander had property in the town from which the officer could have levied the tax assessed on him, a motion for that tax was not sustainable. If the corporation did not choose to risk levying the tax by seizure, they might have instituted a suit to determine their right.

This court is unanimously of opinion, that the circuit court erred in giving judgment for the plaintiff *on motion*, and therefore directs *that the said judgment be reversed and annulled.*

HENDERSON *v.* MOORE.

ERROR to the circuit court of the district of Columbia.

The refusal of the court below to grant a new trial is not error.

Upon the plea of payment to an action of debt upon a bond conditioned to pay 500 dollars, evidence may be received of the payment of a smaller sum with an acknowledgment by the plaintiff that it was in full of all demands; and from such evidence, if uncontradicted, the jury may and ought to infer payment of the whole.

On the plea of payment to an action of debt upon a bond, for 500 dollars, dated in 1781, the defendant offered evidence to prove that in the year 1797 the plaintiff acknowledged that he had received of the money of the defendant to the amount of about 1,000 dollars, of one Willoughby Tibbs, out of the amount of a decree which the defendant had obtained against him for 3,000 dollars, and that the money which he so received was in full of all his claims against the defendant, the plaintiff having paid for the defendant several sums of money. There was no settlement made, nor any receipt given. "Whereupon the plaintiff prayed the court to instruct the jury, that if from the evidence they should be satisfied that the bond had not been fully paid off, no declaration of the plaintiff's '*that his claims against the defendant were all satisfied*' would be a bar to his recovery in this action; which instruction

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the court refused to give as prayed, but directed the jury that if they should be satisfied by the evidence, that the defendant, in the year 1797, paid the plaintiff a sum of money less than the amount mentioned in the condition of the bond, which the plaintiff at that time acknowledged to be in full satisfaction of all his claims against the defendant, such payment and such acknowledgment, are competent evidence upon the plea of payment, and that the jury may and ought to presume therefrom that the whole sum mentioned in the condition of the said bond has been paid to the plaintiff, unless such presumption be repelled by other evidence in the cause; to which refusal and instruction the plaintiff excepted."

The verdict being for the defendant, his counsel moved the court for a new trial, and grounded his motion upon sundry affidavits tending to prove that the whole amount of the bond remained due to the plaintiff, and that he was surprised by unexpected testimony at the trial. But the court refused to grant a new trial.

Two errors were assigned.

1. That the court below refused a new trial.

2. That the court ought to have given the instruction to the jury as prayed by the plaintiff; and ought not to have given the direction which they did.

MARSHALL, Ch. J. said that this court had decided at the last term, that a refusal by the court below to grant a new trial was not error.

The case being submitted upon the other point, without argument,

MARSHALL, Ch. J. delivered the opinion of the court,

That there was no error in the opinion of the court below. A part of the money due on the bond

might have been paid before; and such an acknowledgment, upon receipt of a sum smaller than the amount of the condition of the bond, was good evidence upon the plea of payment.

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Judgment affirmed with costs.

COOKE AND OTHERS *v.* WOODROW.

ERROR to the circuit court of the district of Columbia, in an action of trover brought by the plaintiffs in error for sundry household goods.

In an action of trover, if the judgment below be in favour of the original defendant, the value of the matter in dispute upon the writ of error in the supreme court of the United States, is the sum claimed as damages in the declaration.

Due diligence must be used to obtain the testimony of the subscribing witness.

If inquiry be made at the place where the witness was last heard of, and he cannot be found, evidence of his hand-writing may be admitted.

A bill of exceptions stated that the plaintiffs on the trial produced in evidence to support their title to the goods, a certain paper writing signed by one John Withers, to which one John Pierson had subscribed his name as a witness, and offered parol evidence to prove that the subscribing witness "had upwards of a year ago left the district of Columbia, and that before he left the said district he declared that he should go to the northward, that is to say, to Philadelphia or New-York, and said he had a wife in New-York. That the said subscribing witness went from the said district to Norfolk, and that when he got there he declared that he should go on further to the south, but where was not known, and that he has not been heard of by the witness for the last twelve months. It appeared that a subpœna had been issued in this case, for the said subscribing witness, directed to the marshal of the district of Columbia, but he could not be found in the said district by the said marshal. The plaintiff then offered to prove the hand-writing of the subscribing witness and of the said John Withers to the said writing, but the court refused to permit the plaintiffs to produce evidence of the hand-writing of the said subscribing witness, and refused to permit the plaintiffs to prove the hand-writing of the said John Withers, otherwise than by the testimony of the said

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subscribing witness; to which refusal the plaintiffs excepted."

C. Simms, for the plaintiffs in error, suggested that this court must be satisfied by evidence (other than the declaration) that the sum in demand exceeded 100 dollars, exclusive of costs; and cited the rule made in the case of *Course* v. *Stead's Executors*, *ante*, vol. 1. p. 17.

But MARSHALL, Ch. J. said, that that rule applied only to cases where the *property itself* (and not damages) was the matter in dispute—such as actions of *detinue*, &c.

If the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute; but where the judgment below is rendered for the defendant, this court has not, by any rule or practice, fixed the mode of ascertaining that value.

The point arising upon the bill of exceptions was submitted without argument.

MARSHALL, Ch. J. after stating the case as it appeared in the bill of exceptions, observed,

That the court had some difficulty upon the point. The general rule of evidence is, that the best evidence must be produced which the nature of the case admits, and which is in the power of the party. In consequence of that rule, the testimony of the subscribing witness must be had if possible. But if it appear that the testimony of the subscribing witness cannot be had, the next best evidence is proof of his hand-writing. In the present case it does not appear to the court that the testimony of the subscribing witness could not have been obtained if proper diligence had been used for that purpose. It does not appear that the witness had ever left Norfolk. It is not stated that any inquiry concerning him had been made there. If such inquiry had been made, and he could not be found, evidence of his hand-writing might have been permitted. But

as the case appears in the bill of exceptions, the court below has not erred.

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Judgment affirmed with costs.

MANDEVILLE AND JAMESSON *v.* WILSON.

ERROR to the circuit court of the district of Columbia, sitting at Alexandria, in an action of *assumpsit* brought by the defendant in error *for goods sold and delivered*, and for the *hire of a slave*.

The defendants below pleaded *non assumpserunt*, and the *statute of limitations*.

To the latter plea the plaintiff replied, "that the said money in the several promises and undertakings aforesaid above mentioned in the declaration, at the time of the making of the promises and undertakings aforesaid, became due and payable on an account current of trade and merchandise had between the said plaintiff and the said defendants as merchants, and wholly concerned the trade of merchandise, to wit, at Alexandria aforesaid, in the county aforesaid, and this he is ready to verify."

To which the defendants rejoined, "that in the month of January, 1799, the partnership of Mandeville and Jamesson was dissolved, and public notice given of such dissolution, of which the said plaintiff had a knowledge at the time, and that at the time of the said dissolution of the partnership aforesaid, all accounts between the said plaintiff and the said Mandeville and Jamesson ceased, and since which time no accounts have existed, or been continued, between the plaintiff and the said defendants, which the said defendants are ready to verify."

The plaintiff surrejoined, "that the goods, wares

Amendments are within the discretion of the court below.

Quære, whether the court ought to permit amendments after judgment upon demurrer.

In the statute of limitations, the exception in favour of merchants' accounts, applies as well to actions of *assumpsit*, as to actions of *account*.

It extends to all accounts current which concern the trade of merchandise.

An account *closed*, by the cessation of dealings between the parties, is not an account *stated*.

It is not necessary that any of the items should have been charged within the five years, nor that the declaration

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andmerchandise in the said declaration mentioned, were by the said plaintiff sold and delivered to the said defendants, and the said negro in the said declaration mentioned was hired by the plaintiff to the defendants before the month of January, in the year 1799, the time when the said defendants in their said rejoinder state their said copartnership was dissolved, and this the plaintiff is ready to verify."

should aver the money to be due upon an open account between merchants.

To this surrejoinder the defendants demurred, and assigned for cause of demurrer, that "the surrejoinder is a *departure* in this, that it is no answer to the defendants' rejoinder."

Upon joinder in demurrer, the court below gave judgment for the plaintiff.

A bill of exceptions stated, that on the day on which the cause was called for trial, the court permitted the plaintiff to withdraw his *general* replication to the plea of the statute of limitations, and to file the above *special* replication. And that after the court had given judgment upon the demurrer, it refused to permit the defendants to withdraw their demurrer, and their rejoinder, and to file a general rejoinder to the plaintiff's replication.

Youngs, for the plaintiffs in error.

1. The plaintiff below ought not to have been permitted to withdraw his general replication, and to reply specially.

LIVINGSTON, J. Is that a proper subject for a writ of error?

Youngs. There are other points; but I suppose it is good ground for a writ of error. It creates delay; and although amendments may be matter of discretion with the court, yet the court is bound to exercise its discretion soundly and legally; it is a discretion which this court will control.

2. The exception in the statute of limitations in favour of merchants' accounts, applies only to ac-

counts current, where there have been mutual dealings, and where some of the items are more and some less than five years' standing. In such cases the last item shall draw all the rest out of the statute. But if all dealings between the parties have ceased for more than five years next before the commencement of the suit, the whole account is barred. An account which has ceased to *run* is an account *closed.* An account closed is an account *stated;* and it is expressly decided that an account *stated* is not excepted from the general operation of the statute. Besides, the exception of the statute is only in favour of actions of *account*, and not actions of *assumpsit.* 2 *Ves.* 400. *Welford* v. *Liddel.* 4 *Mod.* 105. *Chievly* v. *Bond.* 2 *Saund.* 124. *Webber* v. *Tivill.**

The replication is repugnant to the declaration; for money due for the hire of a negro cannot be "money due on *an account current of trade and merchandise.*"

The *declaration* ought to have stated the money to be due upon such an account.

3. The court below ought to have permitted the defendant to withdraw his demurrer and his rejoinder, and rejoin generally to the replication.

E. J. Lee, contra, having cited 3 *Wooddeson*, 83. 85. as to the principal question, was stopped by the court, as to the error alleged in the permission given by the court below to the plaintiff to amend before trial, and the refusal to allow the defendants after judgment upon the demurrer to withdraw it and take issue on the fact.

MARSHALL, Ch. J. observed that the permitting amendments is a matter of discretion. He did not mean to say that a court may in all cases permit or

* But see *Serjeant Williams's* note to that case in his edition of Saunders's Reports. The statute of Virginia, so far as it relates to the questions in this case, is precisely like the British statute of 21 Jac. c. 16. s. 3.

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refuse amendments without control. A case may occur where it would be error in a court, after having allowed one party to amend, to refuse to suffer the other party to amend also before trial. But that is not this case. After the parties have gone to trial upon a set of pleadings, and the judgment has been pronounced, it may be doubted whether the court can permit the demurrer to be withdrawn. It would not be right in all cases, after the party had taken issue upon the law, and it has been decided against him, to suffer him also to take issue upon the fact. If it be permitted, it is a matter of great indulgence.

There is no ground for the objection taken to the declaration in this case, that it ought to have averred that the money was due on an account concerning the trade of merchandise.

A declaration need not set forth the circumstances which take the case out of the statute of limitations.

Youngs cited 6 *T. R.* 691. *Holt v. Scholefield*, to show that when general damages are given, if there be one bad count in the declaration, the court will arrest the judgment.

MARSHALL, Ch. J. But by the statute of jeofails in Virginia, under whose laws this case was tried, the judgment shall be rendered for the plaintiff, upon a general verdict, if there be one *good* count in the declaration.

On a subsequent day

MARSHALL, Ch. J. delivered the opinion of the court,

That the exception in the statute applied to actions of *assumpsit*, as well as to actions of account. That it extended to all accounts current which concern the trade of merchandise between merchant and merchant. That an account closed by the cessation of dealings between the parties is not an account

stated, and that it is not necessary that any of the items should come within the five years. That the replication was good, and not repugnant to the declaration; and that the rejoinder was bad.

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Judgment affirmed with costs.

FAIRFAX'S EXECUTOR *v.* ANN FAIRFAX.

ERROR to the circuit court for the district of Columbia, sitting at Alexandria, in an action of *assumpsit* brought by the defendant in error against the plaintiff in error, as executor.

Upon the issue of *plene administravit* the jury must find specially the amount of assets in the hands of the executor, otherwise the court cannot render judgment upon the verdict.

If the defendant below intermarries after the judgment, and before the service of the writ of error, the service of the citation upon the husband is sufficient.

Upon the issues of *non assumpsit* and *plene administravit*, the jury found a general verdict, which was recorded in this form: "We of the jury find the issues for the plaintiff, and assess the damages to two hundred and twenty dollars and ninety-five cents." Upon which verdict the judgment of the court was "that the plaintiff recover against the defendant her damages aforesaid in form aforesaid assessed, and also her costs by her about her suit in this behalf expended, to be levied of the goods and chattels of the said Bryan Fairfax, deceased, at the time of his death, in the hands of the said defendant to be administered, if so much, &c. but if he hath not so much, then the costs aforesaid to be levied of the proper goods and chattels of the said defendant; and the said defendant in mercy," &c.

The error relied upon by the plaintiff in error was, that the jury had not found the amount of assets in his hands to be administered.

Swann, for the plaintiff in error, having cited *Esp. N. P.* 263. and the case of *Booth's Executors* v. *Armstrong*, 2 *Wash.* 301., was stopped by the court, who requested to hear Mr. *E. J. Lee* on the other side.

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E. J. Lee, contra.

There was no necessity for the jury to find specially the amount of the assets, for if ever so small a sum had been found, the judgment would have been the same as if assets had been found to the whole amount of the plaintiff's claim. The sum found by the jury would not alter the judgment. It would still have been for the whole debt *de bonis testatoris si*, &c. and *si non*, then the costs *de bonis propriis*.

But here the jury have in substance found that the *defendant had assets more than sufficient to satisfy the debt due to the plaintiff;* for that is the allegation of the plaintiff in her replication, and the jury have found the issue for the plaintiff upon that replication.

It is not more necessary to find specially upon this issue than upon *non assumpsit* or *nil debet*.

There is a difference between this case and that of *Booth's Executors* v. *Armstrong*, 2 *Wash.* 301., for there the finding was not, as here, generally, "*we find the issues for the plaintiff;*" but "*we find for the plaintiff the debt in the declaration mentioned, and one penny damages.*" The finding there was special, and could not be construed to be a finding of the matter of the plaintiff's replication as the finding in the present case may and ought to be.

The cases cited to show that the amount of assets found could not alter the judgment were, 8 *Co.* 34. *Mary Shipley's* case. *Cro. Eliz.* 592. *Waterhouse* v. *Woodstreet. Styles*, 38. *Gawdy* v. *Ingham. Freem.* 351. *Oxendan* v. *Hobdy. Bro. Execution, pl.* 34. *pl.* 82. *Godbolt*, 178. *Newman* v. *Babington. Cro. Car.* 373. *Dorchester* v. *Webb. Lex Test.* 414.

February 21.

MARSHALL, Ch. J. delivered the opinion of the court to the following effect:

The verdict ought to have found the amount of the assets in the hands of the defendant to be administered.

The cases cited to show that the judgment must be for the whole sum, if the verdict find any assets, have been overruled. This is declared by Lord *Mansfield*, in a case cited in *Gwillim's* edition of *Bac. Abr.* and the law is now well understood to be, that the executor is only liable for the amount of assets found by the jury. In Virginia the law has been so settled. The case cited from 2 Wash. Rep. is precisely in point. The counsel for the defendant in error attempted to show a distinction arising from the difference of form in which the verdicts were rendered. But the two verdicts appear to the court to be precisely alike in substance.

The defendant in error relies on the form of the issue. She contends that as the replication alleges that the defendant has assets more than sufficient to satisfy the debt, the finding of that issue for the plaintiff below, is in effect finding that the defendant has assets more than sufficient to satisfy the debt; and if so, it is wholly immaterial what the real amount of assets is. But if this were the issue, and the demand were 500 dollars, if the jury should find that the defendant had assets to the amount of 499 dollars, the judgment must be for the defendant.

But the law is not so. An executor is liable for the amount of assets in his hands, and not more.

The issue really is, whether the defendant has *any*, and what amount of assets in his hands.

Judgment reversed.*

* *Vide*, 3 *T. R.* 688, 689. Harrison *v.* Beecles.

E. J. Lee had previously moved this court to quash the writ of error, because the citation was not served on *Ann* Fairfax, the defendant

M'KEEN *v.* DELANCY'S LESSEE.

Under the act of Pennsylvania of 1715, which requires a deed to be acknowledged before *a justice of the peace* of the county where the lands lie, it had been the long established practice before the year 1775 to acknowledge deeds before a justice of the supreme court of the province of Pennsylvania. And altho' the act of 1715 does not authorize such a practice, yet as it has prevailed it is to be considered as a correct exposition of the statute.

Under the same statute, if a deed conveyed lands in several counties, and was recorded in *one* of those counties, an exemplification of it was good evidence as to the lands in the other counties.

ERROR to the circuit court for the district of Pennsylvania, in an action of ejectment.

The only question was, whether the exemplification of a deed from Allen to Delancy, could be lawfully read in evidence at the trial.

This question arose upon the following case:

William Allen, on the 27th of December, 1771, being seised in fee of the land in controversy, lying in Northampton county, by deed of bargain and sale of that date, conveyed the same to James Delancy and Margaret his wife, in fee. The deed also conveyed real estate in the counties of Philadelphia and Bucks, and was acknowledged by the bargainor in the city of Philadelphia, on the 7th of December, 1772, before John Lawrence, one of the justices of the supreme court of the province of Pennsylvania, and recorded on the 11th of May, 1773, in the office of the recorder of deeds for the city and county of Philadelphia; but not recorded in the county of Northampton, nor in the county of Bucks, nor in any other county in Pennsylvania; offices for recording deeds being established in the said counties of Northampton and Bucks, according to law, from the date of the said deed to the present time.

The circuit court admitted the exemplification to be read in evidence; and the verdict and judgment were for the plaintiff below.

in error; but on her husband Charles I. Catlett, with whom she had intermarried since the judgment below.

But the court overruled the motion, saying,

That the act of congress, *vol.* 1. *p.* 62. § 22. does not designate the person upon whom the citation shall be served, but only directs that the *adverse party shall have at least thirty days' notice.*

The citation served on the husband is well. The service is sufficient.

Rodney, Attorney-General, for the plaintiff in error.

By the laws originally agreed upon and adopted by William Penn and his followers, before they left England, in May, 1682, section 20. (*Appendix to Laws of Pennsylvania, p.* 4.) it was declared, that "to prevent *frauds* and vexations within the said province," "all conveyances of land made in the said province" "shall be enrolled or registered in the public enrolment-office of the said province, within the space of two months next after the making thereof, else to be void in law." Deeds made out of the province were to be enrolled in like manner within six months.

This shows that it was the prevailing sentiment among them that means should be taken to prevent clandestine conveyances; and from thence it may be inferred that such was the intention and end of all their laws requiring the enrolment of deeds.

By the act of 1683, *c.* 79. (*Appendix, p.* 9.) it is enacted, "that all deeds of sale, mortgages, settlements, conveyances, (except leases for a year,) shall be declared and acknowledged in open court."

In 1688, a temporary law, to continue one year only, confirmed deeds theretofore made and not properly recorded, and allowed twelve months for recording deeds made out of the province, and six months for those made in the province; otherwise they were to be void. The same act permits the recording of bills, bonds and specialties, for safe keeping, but expressly declares that such recording is not necessary as to those writings.

In 1693 it was enacted that deeds were good and valid, although never recorded; and it was declared that no deeds or other writings shall be required to be recorded; but that such deeds and writings as shall be enrolled or registered in the *Roll's Office*, and the exemplification of the records of the same,

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in all courts of judicature, shall be allowed and judged as valid as the original.

Then came the act of 1715, *c.* 9. (*Laws of Pennsylvania*, *p.* 78.) the 1st section of which enacts, "that there shall be an office of record in each county in this province, which shall be called and styled *the office for recording of deeds*," and that the recorder "shall record, in a fair and legible hand, all deeds and conveyances that shall be brought to him for that purpose, according to the true intent and meaning of this act." The 2d and 3d sections provide that all conveyances of land in the province "*may* be recorded in the *said office*," but before the same could be recorded they were to be acknowledged or proved "before one of the *justices of the peace of the proper county* or city *where the lands lie*."

The 4th section enacts, "that all deeds and conveyances made and granted out of this province, and brought hither and recorded in the county where the lands lie, (the execution thereof being first proved by the oath or affirmation of one or more of the witnesses thereunto, before one or more of the justices of the peace of this province," or before any mayor, &c. of the place where executed, certified, &c.) "shall be *as valid as if the same* had been made, acknowledged or proved *in the proper county where the lands lie* in this province."

The 5th section enacts, "that all deeds made, or to be made, and proved or acknowledged and recorded *as aforesaid*, which shall appear so to be, by endorsement made thereon, according to the true intent and meaning of this act, shall be of the same force and effect here, for the giving possession and seisin, and making good the title and assurance of the said lands, tenements and hereditaments, as deeds of feoffment with livery and seisin, or deeds enrolled in any of the king's courts of record at Westminster, are or shall be in the kingdom of Great Britain: and the copies or exemplifications of all deeds so enrolled, being examined by the recorder, and certified under the seal of the proper office, (which the

recorder or keeper thereof is hereby required to affix thereto,) shall be allowed in all courts where produced, and are hereby declared and enacted to be as good evidence, and as valid and effectual in law, as the original deeds themselves, or as bargains and sales enrolled in the said courts at Westminster, and copies thereof, can be, and that the same may be showed, pleaded and made use of accordingly."

The 6th section declares the force and effect of the words "*grant, bargain and sell.*"

The 7th section declares the punishment for forging certificates of acknowledging and recording.

The 8th section enacts, "that no deed *or* mortgage, or defeasible deed in the nature of mortgages, hereafter to be made, shall be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein for life, or years, unless such deed be acknowledged or proved, and recorded within six months after the date thereof, *where such lands lie as herein before directed for other deeds.*"

The 9th and 10th sections prescribe the mode of acknowledging satisfaction of mortgages.

The 11th section appoints recorders for the respective counties of Philadelphia, Bucks and Chester, which were then the only counties in the province.

By this act no power was given to a judge of the supreme court. Indeed, no such court then existed. The supreme court was established by the act of May 22, 1722, section 11. but no such power is given thereby to the justices of that court.

The act of 1775 expressly gives the power to the justices of that court, from whence a strong inference is drawn that they had not the power before. The expressions of the second section of that act are, "that all such deeds and conveyances, which shall be made and executed out of this province, after the

publication of this act, and acknowledged or proved in manner as directed by the laws heretofore for that purpose made, *or* proved by one or more of the subscribing witnesses before any *supreme judge* of this province, shall be recorded," &c. It is clear from this mode of expression, that a deed acknowledged or proved before a *supreme judge*, was not acknowledged or proved *in manner as directed by the laws theretofore for that purpose made.* Such an acknowledgment, therefore, prior to the year 1775, was not legal, and did not, under any existing law, authorize the recording of the deed; and the exemplification of a deed from the records, not legally recorded, cannot be evidence.

This deed was acknowledged before a supreme judge prior to the year 1775, and not before any justice of peace of the province.

Again, it is clear from the purview of the act of 1715, that the proper office for recording deeds of lands, was the office in the county where the lands lie.

These lands lie in Northampton county, but the deed was recorded only in the office of the county of Philadelphia. This objection is as fatal as that respecting the acknowledgment.

Lewis, contra.

There was a supreme court in Pennsylvania long before the act of 1715. It is mentioned in the 9th section of the act of *March* 27, 1713, *c.* 3. where an appeal from the sentence of the orphans' court is given to the supreme court.

1. As to the place of record.

Part of the lands conveyed by this deed lie in the county of Pennsylvania, in which county the deed was recorded. It was therefore within the strict letter of the law *recorded in the county where the lands lie.* It was not necessary by the act that the

deed should be recorded in *every* county in which any part of the lands should lie. It was sufficient if recorded in the county where any part of the lands lie.

But it was not necessary that it should be recorded in the county where the lands or any part of them lie.

The object of the act was not *notice* but safe keeping of the deeds. It does not require that any deed should be recorded. It was intended merely for the benefit of the grantee, and for that purpose it was immaterial in what public office the deed was recorded. Before the act of 1715, the Roll's Office in Philadelphia was the only place of record. That act simply provided that there should be such an office in every county, to which people might with convenience resort to put their deeds on record for safe keeping.

By the 1st section of the law, the recorder in each county is bound to record *all* deeds *which shall be brought to him for that purpose*, whether the lands lie within or without the county. "The *said* office," in the 2d section, means either of the said offices. No time is limited within which the deed must be recorded.

The whole tenor of the act shows that the purpose of recording was merely for safe keeping.

Thus stood the law till the act of 1775 declared, that unless deeds and mortgages should be acknowledged, or proved and recorded, within a certain time, in the counties where the lands lie, such deeds or mortgages should be void as to creditors and subsequent purchasers.

The provisions of this act show that no such provisions existed before. The evil complained of in the preamble of the act, was the frauds upon creditors and subsequent purchasers by means of *secret* deeds

and mortgages. This evil could not have existed if the object of the act of 1715 was to give notice.

The object of that act, therefore, was safe keeping. The recording or the omission to record the deed did not affect the title. It was therefore perfectly immaterial in which of the offices the deed should be recorded. It was perfectly optional with the grantee whether he would have his deed recorded at all; and if he did choose to have it recorded, it was equally optional with him in which of the offices it should be recorded.

2d. As to the acknowledgment.

It had been the cotemporaneous and uniform practice from the year 1715 to the date of this deed, to acknowledge deeds before a judge of the supreme court of Pennsylvania. That practice had never been questioned. The grantor in the present deed was the chief justice of that court and had been so for 40 years before. He and the judge who received the acknowledgment must have been perfectly satisfied of the practice, and that it had been unquestioned. Judge Peters, who sat in the trial of this cause in the court below, stated, and the whole bar admitted, the practice to be so. No person could be better acquainted with this practice than Judge Peters, whose father was secretary of the land-office, and who was himself a large landholder.

There never was a doubt suggested upon this subject until the present case. If the practice be now decided to be incorrect, it will cut deep into the titles of Pennsylvania.

LIVINGSTON, J. I doubt whether this court can take notice of such a practice unless it be spread upon the record by a bill of exceptions, or found by a special verdict. If we can, and if the practice be so, I think it puts an end to the question.

Lewis. The evidence of the practice was offered, not to the jury as a fact, but to the judge, to inform him what had been the construction uniformly put

upon the law by courts, judges and legislators, and by the whole people of the state.

MARSHALL, Ch. J. I do not know how this court can take notice of it as a practice or custom, without the consent of the parties; but I consider it as an exposition or construction of the law. If decisions of the courts of Pennsylvania had been made upon the question, they might be produced. If no cases are reported, the court will take other information as to the construction given to the law by the courts of Pennsylvania.

If such have been the uniform decisions of their courts at the time, as there are no reports of cases, if the counsel agree as to the construction given by the courts, this court can receive it as evidence of those decisions. But if gentlemen differ in their statements, the court would not be willing to decide as to the credit to be given to the one statement or the other.

Ingersoll, for the plaintiff in error, said he could not admit any statement admitting that it had been the practice to admit in evidence exemplifications of deeds not recorded in the county where the lands lie.

Lewis named 27 cases in which he had been concerned as counsel, and in which such exemplifications had been used in evidence, and no objection ever taken.

MARSHALL, Ch. J. That part of the argument may be omitted for the present, and if the court should not be able to decide the case without evidence of the practice, we will decide whether we will hear the statements on that subject.

Lewis. Part of the lands lie in Philadelphia county, where the deed was recorded. An exemplification would be good evidence in a contest respecting those lands, and if good evidence for one purpose, it will be good as to the other.

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If the law authorizes a deed to be recorded in a particular office, an exemplification from that office is good evidence in all cases. It would have been good evidence in an action of covenant upon the deed; and there can be no difference in an action of ejectment. *Gilb. Ev.* 97. 99, 100. 2 *Vin. Abr.* 598. 12 *Vin.* 105. 107. 2 *Eq. Cas. Abr.* 413.

Ingersoll, in reply.

The common law did not require any deed to be recorded. Before the act of 1715, the English register acts, and the acts for enrolment of deeds, were well known in Pennsylvania: and they were for the purpose of notice. The evil to be remedied was the frequency of clandestine conveyances.

The 1st section of the act does not require the recorder to record "all deeds and conveyances which shall be brought to him for that purpose," but "all deeds and conveyances which shall be brought to him for that purpose *according to the true intent and meaning of this act;*" that is, all deeds and conveyances of land *lying in his county*.

The 2d and 3d sections require the acknowledgment or proof to be before *one of the justices of the peace of the proper county or city where the lands lie.* The power to certify acknowledgments was not given to a judge of the supreme court until 1775, when the express grant of the power was strong evidence that they did not already possess it.

There is no more reason that a foreign deed should be proved and recorded in the county where the lands lie, than that a domestic deed should be so proved and recorded. Yet the 4th section of the act is explicit with regard to foreign deeds, that they shall be so proved and recorded; and in order to show that they meant the same thing in the case of domestic deeds, the legislature say that a foreign deed, so proved and recorded, shall be as valid "as if the same had been made, acknowledged, or proved, *in the proper county where the lands lie;*" thereby

intimating, that the acknowledgment or proof in the county where the lands lie, was the proper mode in all other cases.

The 5th section immediately follows, and declares that all deeds "proved or acknowledged and recorded *as aforesaid*," shall transfer the possession, and that exemplifications thereof shall be evidence.

Here the words "*as aforesaid*" refer to the description last antecedent, that is, *in the county where the lands lie*. Again in the 8th section it is declared, that no mortgage shall be good unless acknowledged or proved and recorded *where the lands lie* "*as herein before directed for other deeds.*" This expression clearly shows that the legislature had before directed that other deeds should be recorded *where the lands lie*.

They had mentioned before but two other kinds of deeds, viz. *foreign* and *domestic*. With regard to foreign deeds they had been as explicit as in the case of mortgages; and if any doubt could be raised as to their expressions relative to *domestic* deeds, that doubt must be removed by the expressions in the 4th and 8th sections.

March 11.

MARSHALL, Ch. J. delivered the opinion of the court as follows, viz.

This case depends entirely on the acts of the legislature of Pennsylvania, respecting the registering of deeds.

The law of Pennsylvania, on this subject, had varied at different times; but as it stood in 1715, when the act passed which must decide this controversy, the recording of a deed was not necessary to its validity; but deeds might be enrolled, and an exemplification was testimony in all courts.

The act of 1715 established an office of record in

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each county in which deeds were to be recorded, and declared an exemplification from the record to be as good evidence as the original. This act, however, does not make the recording of a deed essential to its validity.

To entitle a deed to be recorded, the act requires that it shall be acknowledged or proved "before one of the justices of the peace of the proper county or city where the lands lie."

In this case the lands lie in different counties; and the deed was acknowledged before John Lawrence, one of the justices of the supreme court of Pennsylvania; and was recorded in the office for the city and county of Philadelphia, in which a part of the lands lie. The land, however, for which this suit was brought, lies in a different county.

The first question which presents itself in this cause is, was this deed properly proved?

Were this act of 1715 now, for the first time, to be construed, the opinion of this court would certainly be, that the deed was not regularly proved. A justice of the supreme court would not be deemed a justice of the county, and the decision would be, that the deed was not properly proved, and therefore not legally recorded.

But, in construing the statutes of a state on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state; and in this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the supreme court as within the description of the act.

It is of some weight that this deed was acknowledged by the chief justice, who certainly must have been acquainted with the construction given to the act, and that the acknowledgment was taken before another judge of the supreme court. It is also re-

collected that the gentlemen of the bar, who supported the conveyance, spoke positively as to the universal understanding of the state, on this point, and that those who controverted the usage on other points, did not controvert it on this. But what is decisive with the court is, that the judge who presides in the circuit court for the district of Pennsylvania, reports to us that this construction was universally received.

On this evidence the court yields the construction which would be put on the words of the act, to that which the courts of the state have put on it, and on which many titles may probably depend.

The next question is, was this deed recorded in such an office as to make the exemplification evidence?

Without reviewing all the arguments which have been urged from the bar, or all the sections of the act, it may be sufficient to observe, that this court is satisfied that, where a single tract of land is conveyed, the law requires the deed to be recorded in the office of the county in which the land lies; but if several tracts be conveyed, it appears to this court that neither the letter nor the spirit of the act requires that the deed should be recorded in each county.

It is material in the construction of this act, that the validity of the deed is not affected by omitting to record it. Though not recorded, it is still binding to every intent and purpose whatsoever. The only legal effect produced by recording it is its preservation, by making a copy equal to the original. The principal motive, then, for requiring that it should be proved before a justice of the particular county in which the land lies, and recorded in that county, is that which has been assigned at the bar. It is the additional security given by those provisions, that a deed, never executed, might not be imposed on the recorder. This object is as completely obtained by placing the deed on the records of that county in

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which one of the tracts of land lies, as it could be if the deed conveyed no other tract. The verity of the deed is as completely secured in the one case as in the other.

It appears to the court also to be within the letter of the law. This deed was unquestionably properly admitted to record in the office of the city and county of Philadelphia. It conveyed lands lying within that city and county, and, on any construction of the act, might be there recorded. The act then proceeds to say, "that the copies of all deeds, so enrolled, shall be allowed in all courts where produced, and are hereby declared and enacted to be as good evidence, and as valid and effectual in law, as the original deeds themselves."

The whole deed, then, is evidence by the letter of the act. The whole is a copy from the record. If the validity of the conveyance depended on its being recorded in the county where the land lies, then a deed might be good as to one tract, and bad as to another. But the deed is valid, though not recorded; and the question is, whether the copy is evidence as to every thing it contains. The execution of the deed is one entire thing, and is proved so as to admit the instrument to record. The copy, if true in part, is true in the whole; and if evidence in part, must, under the act, and on the general principle that it is the copy of a record, be evidence in the whole.

There is no error in the judgment of the circuit court; and *it is affirmed with costs.*

JOHN AND JAMES TUCKER *v.* OXLEY, ASSIGNEE OF T. MOORE, A BANKRUPT.

Under the bankrupt law of the United States a *joint* debt may be proved under a commission against one partner.

ERROR to the circuit court of the district of Columbia, sitting at Alexandria, in an action of *assumpsit* for goods sold and delivered, brought by Oxley,

assignee of Thomas Moore, a bankrupt, against the plaintiffs in error. Upon the general issue, the jury found a verdict for the plaintiff below for 143 dollars and 33 cents, subject to the opinion of the court upon the following case:

Thomas Moore, the bankrupt, carried on the trade and business of a vendue master in copartnership with one Henry Moore, which copartnership was on the 31st of March, 1802, dissolved on the terms that Thomas Moore should collect the balances due to, and pay the debts due from the joint concern as far as the joint property would extend. Thomas Moore carried on the trade and business of a vendue master on his separate account from that time until the 2d of September following, when he became bankrupt, and a commission being duly awarded and issued against him, he was duly declared a bankrupt according to the laws of the United States then in force concerning bankrupts; under which the plaintiff was duly appointed assignee.

While Henry and Thomas Moore carried on the business of vendue master in partnership, they became jointly indebted to the defendants, John and James Tucker, in the sum of 106 dollars and 49 cents, being the balance of account due to the defendants, for their goods sold by H. and T. Moore, at vendue. After the dissolution of the partnership, and while Thomas Moore carried on business on his separate account, the defendants, the Tuckers, at different times, from the 19th of April to the 22d of July, 1802, knowing that the partnership was dissolved, and that Thomas Moore carried on business on his separate account, purchased of him at vendue, goods to the amount of 113 dollars and 12 cents, which goods were charged to the defendants, the Tuckers, in the separate books of Thomas Moore, without credit being given to the defendants for the joint debt due to them from Henry and Thomas Moore. Thomas Moore being examined as a witness, proved that he intended, at the time of selling the goods to the defendants, to give them credit for the joint debt due to them from Henry

debt may be set off against the *separate* claim of the assignee of *one* of the partners. But such offset could not have been made, at law, independent of the bankrupt law.

A joint debt may be proved under a separate commission, and a full dividend received. It is equity alone which can restrain the joint creditor from receiving his full dividend until the joint effects are exhausted.

and Thomas Moore, but nothing was said or agreed on the subject, between him and the defendants, nor was any such credit ever given before his bankruptcy. This action is brought for the price of the goods so sold and delivered by Thomas Moore in his separate capacity. If the court should be of opinion, upon the case stated, that the defendants are entitled to have the joint debt due to them by Henry and Thomas Moore deducted from the sum claimed in this action, the verdict was to be reduced to 16 dollars and 63 cents, and judgment to be entered accordingly.

The opinion of the court below being, that the joint debt could not be set off against the separate claim of the bankrupt, judgment was rendered for the plaintiff for the larger sum; whereupon the defendants brought a writ of error.

C. Simms, for the plaintiff in error.

All contracts with partners are joint and several; and every partner is liable to pay the whole. In what proportion the others are to contribute is a matter merely among themselves. The plaintiff may bring his action at law against any one of the partners, and can only be compelled by plea in abatement to join them all. 5 *Burr.* 2613. 1 *Esp.* 117.

By the 42d section of the bankrupt law, (*vol. 5. p.* 74.) it is declared, that where there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them, the assignee shall state the account between them, and one debt shall be set off against the other, and the balance of such account, after such set-off, and no more, shall be claimed or paid on either side respectively.

Lord Chancellor Hardwicke, in *Edwards's* case, 1 *Atk.* 100. doubted whether, under the statute relating to mutual debts, a debt due from A. to B. could be set off against a debt due from B. to A. and C. In that case C. was not in any manner liable to B. for the debt due from A. to B.

But in the present case, Thomas Moore was liable to the Tuckers for the debt due to them from *Henry* and Thomas Moore, and the Tuckers might have compelled payment from Thomas alone.

The clause in the act of parliament, 5 *Geo.* II. relating to mutual credits, and which is the same as the 42d section of our bankrupt law, has received a very liberal construction. 1 *Atk.* 228. *Ex parte Deeze.* 1 *Atk.* 230. *Ex parte Charles Prescot.*

By the 34th section of the bankrupt law it appears that a partnership debt may be proved on a separate commission against one of the partners. By that section it is declared, that the "bankrupt shall be discharged from all debts by him due or owing at the time he became bankrupt, and all which were or might have been proved under the commission;" with this *proviso*, "that no such discharge of a bankrupt shall release or discharge any person *who was a partner* with such bankrupt, at the time he became bankrupt, *or who was then jointly held or bound* with such bankrupt, for the same debt or debts from which such bankrupt was discharged as aforesaid."

And it may be laid down as a general rule, that a debtor of a bankrupt may be allowed to set off any debt due from the bankrupt which he could have proved under the commission. *Coop. B. L.* 247.

Jones, contra.

The debt for which this action was brought against the Tuckers, was contracted long after the dissolution of the partnership of Henry and Thomas Moore. It was, and yet stands, charged against them on the separate books of Thomas Moore.

It is neither a mutual debt, nor a mutual credit. They are claims in different rights.

It is a general principle, in cases of bankruptcy, that the joint funds are to be applied to the discharge of the joint debts, and the separate funds to the dis-

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charge of the separate debts. The separate creditors can only come upon the joint fund for their debtor's share of the surplus, after paying the joint creditors; and the joint creditors can only come upon the separate fund for the surplus, after payment of the separate creditors.

A joint creditor can only prove under the separate commission for the chance of that surplus, and to assent to or dissent from the allowance of the certificate. *Cooke's B. L.* (4th edit.) 237. 244. 250. 3 *Vez.* jun. 238. *Ex parte Elton.* 4 *Vez.* jun. 837. *Ex parte Abell.*

There is no statute in Virginia which authorizes set-off. The question depends entirely upon the 42d *section* of the bankrupt law of the United States, which is precisely like the 28th *section* of the act of parliament of *5 Geo.* II. *c.* 30. *Cooke's B. L.* 541. 544.

It is clear that the separate creditors cannot come upon the joint fund until all the joint creditors are paid; it is unreasonable that the joint creditors should take the whole separate estate without looking at all to the joint estate. In the present case it is not stated that the joint funds were exhausted. It does not appear but that the other partner is solvent. The assignee of Thomas Moore cannot collect the debts due to Thomas and Henry Moore, and it is inequitable that he should be obliged to pay their debts.

In order to be set off under the bankrupt law, it must be a *plain mutual credit. Cooke's B. L.* 568. If due in different rights, it cannot be set off. A separate claim against one partner cannot be set off against a joint demand. 1 *Wash.* 77. *Scott* v. *Trent.*

Simms, in reply.

The defendants below might have proved their debt under the commission against Thomas Moore.

The 34th section of the bankrupt law provides,

that a discharge under a commission against one partner shall not discharge the other partner; which provision would be wholly unnecessary, if a joint debt could not be proved under that commission.

It is true that there is no statute in Virginia authorizing set-off; but under the equity of the statute respecting the action of debt by the assignees of promissory notes and bonds, set-off has been allowed in that state.

But the assignee of T. Moore, if he had an equitable right to the joint debts, might bring an action in the joint name, and a court of law would protect his equity.

LIVINGSTON, J. I do not recollect any particular authority, but I have always considered it as one of the clearest principles of law, that a joint debt cannot, at law, be set off against a separate claim.

February 15.

MARSHALL, Ch. J. delivered the opinion of the court, as follows:

In this case the plaintiffs in error, who were defendants in the circuit court, claimed to set off against a debt due from them to Thomas Moore, the bankrupt, a debt previously due to them from the firm of H. and T. Moore, which firm was dissolved, and the partnership fund had passed to T. Moore. This offset was not allowed; and its rejection is the error alleged in the proceedings of the circuit court.

At law, independent of the statute of bankruptcy, the court is of opinion that this discount could not have been made in a suit instituted by Thomas Moore against the Tuckers; and if the words of the act of congress allowing set-off in the case of mutual debts and credits were to be expounded without regard to the provisions of that act in other respects, it is probable that they would not be extended beyond that technical operation, to which has been

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allowed the term "mutual debts," in ordinary cases. But the bankrupt law changes essentially the relative situation of the parties; and the provisions making that change are thought, by a majority of the court, to have a material influence on the words of the 42d section of the act, which provide for the case of mutual debts and credits.

It is the opinion of the court that this is a debt, which might have been proved under the 6th section of the act. It is a debt, which, by a suit against both the partners, might have been recovered against either of them, and either might have been compelled to pay the whole. Although due from the company, yet it is also due from each member of the company; and the claim of the creditor for its satisfaction extended, previous to the act of bankruptcy, to the whole property of each member of the firm, as well as to the joint property of the firm. It would be certainly impairing that claim to apply, by the operation of law, the whole particular fund to other creditors, who, at the time of the bankruptcy, had not a better legal claim on that fund than the Tuckers, without allowing them to participate in it. The court, therefore, would be much inclined to consider the creditors of the partnership as having a right, under the general description of creditors of the bankrupt, to prove their debts before the commissioners. But all doubt on this subject seems to be removed by the *proviso* to the 34th section. That section declares, that the bankrupt shall be discharged from all debts which were due from him at the date of the bankruptcy, and all which were or might have been proved under the said commission, "Provided that no such discharge of a bankrupt shall release or discharge any person, who was a partner with such bankrupt at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts, from which such bankrupt was discharged as aforesaid."

Thomas Moore, then, is discharged from the debt due from Henry and Thomas Moore to the Tuckers; and if he is discharged therefrom, it would seem to

be an infraction of their pre-existing rights not to allow them a share of his property. It is deemed by the court material in the construction of this statute, that, as the proviso shows the joint creditors to be within the description of the terms creditors of the bankrupt, so as to enable them to prove their debts under the commission, they are of necessity comprehended within the same terms in those sections which direct to whom the dividends are to be made. The words of the 29th and 30th sections are imperative. They command the commissioners to divide the estate of the bankrupt among such of his creditors as shall have made due proof of their debts, in proportion to the amount of their claims. Consequently, every creditor who proves his debt is entitled to a dividend.

But, although the creditors of H. and T. Moore might have proved their debt before the commissioners, and have received a dividend out of the estate of the bankrupt, it may be contended that, having failed to do so, they are not entitled to set off their whole claim.

The 42d section of the act directs, that where it shall appear to the commissioners that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other; and what shall appear to be due on either side, on the balance of such account, after such set-off, and no more, shall be claimed or paid on either side respectively.

The term "debt," as used in this section, is fairly to be construed to mean any debt for which the act provides. A debt which may be proved before the commissioners, and to the owner of which a dividend must be paid, is a debt in the sense of the term as used in this section.

Were this doubtful, it cannot be denied that the advantage given by the section is reciprocal, and in any case where the set-off would be allowed, if the balance was against the bankrupt, it must be allowed if in his favour. It has already been stated that the Tuckers might have proved their claim before the commissioners. Can it be doubted that the whole of the debt due to the bankrupt would, under this section, have been deducted from that claim? We think it cannot be doubted. Then, the terms applying alike to each party, the debt due to the Tuckers must be set off from that which they owe the bankrupt.

If the "assignee of the estate ought to have stated the account," and have only claimed the balance, his omitting so to do cannot enlarge his rights; he can only recover what he ought to have claimed.

This, which seems to be the naked law of the case, is not unreasonable. It is fair to conclude that the Tuckers forbore to recover the money due to them from H. and T. Moore, in consideration of their dealings with T. Moore, after he traded on his separate account.

This exposition of the bankrupt act appears to the court to conform to that which is given in England. As the bankrupt law of the United States, so far as respects this case, is almost, if not completely, copied from that of England, the decisions which have been made on that law by the English judges may be considered as having been adopted with the text they expounded.

In England, it has never been doubted that a man, having a claim on two persons, might become a petitioning creditor for the bankruptcy of one of them. Such petitioning creditor has always been admitted to prove his debt before the commissioners, and to receive his dividends, in proportion, with the other creditors. He is, then, in contemplation of the act, a creditor of the bankrupt; and, consequently, all the

provisions of the act apply to him, as to other creditors. This would seem to prove that, under the legal operation of the act, a creditor of a firm, of which the bankrupt was one, and a creditor of the bankrupt singly, were equally creditors of the bankrupt, in contemplation of the law, and were construed to come equally within the meaning of the term, as used in the act. If this position be correct, the rules which we find laid down by the chancellor, for marshalling the respective funds, are to be considered merely as equitable restraints on the legal rights of parties, obliging them to exercise those rights in such manner as not to do injustice to others. This is the peculiar province of a court of chancery. It is the same, in principle, with the common case of marshalling assets, where specialty creditors, who have a right to satisfaction out of lands, exhaust the personal estate, to the injury of simple contract creditors.

It is undoubtedly unjust that the Tuckers, having a claim on H. and T. Moore, and being able to obtain payment from H. Moore, should satisfy that claim entirely out of the separate estate of T. Moore, to the exclusion of other creditors, who had no resort to Henry; and it is probable that a court of chancery might restrain this use of his legal rights within equitable limits. But suppose H. Moore, also, to be a bankrupt; or to be insolvent, and unable to pay the debt; would it not be equally unjust to apply the estate of each individual to the discharge of the several debts, to the entire exclusion of their joint creditors, who, previous to their bankruptcy, had a legal and equitable right to satisfaction out of the separate estate of each?

Mr. Cooke has made a very good collection of the decisions in England, on this question. It will be found that a creditor of the partnership was first permitted by consent to prove his debt before the commissioners of the individual bankrupt, and to receive dividends from the separate fund. It was afterwards decided by the chancellor that he had a right

so to do: and in conformity with this decision was the regular course of the court, until the year 1796. During this time, however, the chancellor, sitting, as chancellor, on a bill suggesting equitable considerations for restraining the order he had made, was accustomed to enjoin the dividends which he had ordered, sitting in bankruptcy. This would seem to prove that, at law, the creditor of the partnership had a right to his dividends from the separate fund, but that equity would compel him first to exhaust the joint fund.

In 1796, this whole subject was reviewed in the case *Ex parte Elton*, reported in 3 *Ves.* jun. This case has been considered as overruling former decisions; but, in the opinion of the court, it confirms the principle already stated. After stating his objection to the prevailing practice, because each order carried in its bosom a suit in chancery, the chancellor took time to consider the subject; and finally determined that the petitioner should be permitted to prove his debt, and that his dividend should be set apart, but not paid to him until an account should be taken of the joint fund.

It is perfectly clear that, in this case, the chancellor, for convenience, exercised, at the same time, his common law and equitable jurisdiction. In conformity with the uniform exposition of the act, he permitted the partnership creditor to prove his debt before the commissioners of the bankrupt, and directed the dividend to be allotted to him out of the separate fund; and then, without the expense of a bill, exercising his equitable powers, he suspended the payment of this dividend, until it should be ascertained how much of it a court of equity would permit the creditor to receive. This does not negative, but affirms, the legal right of a partnership creditor to come on the separate fund.

It appears also to be admitted, that if the particular creditors should be satisfied without exhausting the fund, the residue might be paid to the partner-

ship creditors. This seems to admit the legal right of those creditors to prove their debts, and to receive their dividends. It is equity, not law, which can postpone them.

It is the opinion of a majority of the court, that the circuit court erred in rendering a judgment on this special verdict for the sum of 143 dollars and 33 cents, instead of the sum of 16 dollars and 63 cents; which was the balance after deducting the debt due from H. and T. Moore to the defendants in that court. It is therefore considered by the court, that the said judgment be reversed and annulled; and that judgment be rendered for the plaintiffs in the circuit court for the sum of 16 dollars and 63 cents, and the costs in the circuit court.

Judgment reversed.

YOUNG *v.* THE BANK OF ALEXANDRIA.

Suits brought by the bank of Alexandria upon promissory notes, made negotiable in that bank, are entitled to trial at the return term of the writ.

ERROR to the circuit court of the district of Columbia, sitting in Alexandria, in an action of *debt* upon a promissory note, negotiable in the bank of Alexandria, made by *Young* to *Yeaton*, and by him endorsed to the bank.

The only question now argued, was whether the court below erred in ruling the plaintiff in error into a trial at the return term of the writ.

The bill of exceptions set forth the *capias ad respondendum* issued by the circuit court of the district of Columbia, on the 10th of November, 1807, returnable "*at the next court.*" The defendant below was taken on the 12th of November. The *next court* was holden by law on the 4th Monday of November, 1807.

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It further stated, that the counsel for the plaintiffs below, having filed his declaration at the return term, prayed the court to fix a day for the trial of the cause during the present term, and also to rule the defendant to plead at a short day during the term, and offered to consent that the defendant should plead the general issue, and under that plea give in evidence any special matter which he could plead either in bar or abatement; to which the defendant objected; but the court ruled him to plead the next day, and upon the general issue being joined, ruled him to trial immediately.

By the general rules of practice established by the circuit court it is ordered, that all process issuing from that court, except executions, be made returnable before the court in term time; and that *rules* be held in the clerk's office on the day after the rising of the court in each term, and on the same day in each month thereafter during the vacation; and that all proceedings and orders taken at the rules shall conform as near as may be to the rules of proceeding directed by an act of the assembly of Virginia, entitled "An act reducing into one the several acts concerning the establishment, jurisdiction and powers of district courts," and the several acts amending the same. By that act, which was passed December 12, 1792, it is ordered, that "one month after the plaintiff hath filed his declaration he may give a rule to plead with the clerk, and if the defendant shall not plead accordingly at the expiration of such rule, the plaintiff may enter judgment for his debt or damages and costs." "All rules to declare, plead, reply, rejoin, or for other proceedings, shall be given regularly from month to month, shall be entered in a book to be kept for that purpose, and shall expire on the succeeding rule day." By the 25th section of that act, it is provided that in certain cases the sheriff may take the engagement of an attorney of the court, endorsed on the writ, that he will appear for the defendant, "and such appearance shall be entered with the clerk in the office, *on the first day after the end of the court to which such process is returnable, which*

is hereby declared to be the appearance day in all process returnable to any day of the court next preceding."

By the act of congress of 27th of February, 1801, it is declared that the laws of Virginia, as they then existed, should be and remain in force in that part of the district of Columbia which was ceded by Virginia to the United States.

By the act of congress of the 3d of March, 1801, § 3. it is enacted, that the circuit court for the county of Alexandria, shall possess and exercise the same powers and jurisdiction civil and criminal as was then possessed and exercised by the district courts of Virginia.

By the act of assembly of Virginia, passed on the 23d of November, 1792, and which incorporated the bank, it is ordered, that in suits brought by the bank, upon notes made negotiable therein, an issue shall be made up, and trial had at the return term of the writ.

Youngs, for the plaintiff in error.

The act of 27th of February, 1801, conferred on the circuit court for the district of Columbia, no other powers than those which had been given generally to the circuit courts of the United States, by the act passed in the same session, *vol. 5. p.* 237. § 11. and by that act no such power is given to those courts in respect to the debts due to the bank.

The 3d section of the act of the 3d of March, 1801, relates to criminal jurisdiction only, or if it relates to the civil jurisdiction, it is not clear that the district courts of Virginia could exercise the power, because those courts were established after the act incorporating the bank.

When this case was before this court at the last term, upon the motion to quash the writ of error,

this court decided that so much of the charter as took away the right of appeal from the debtors to the bank, in the courts of Virginia, did not apply to the courts of the United States; and a distinction was taken between the *rights* which the bank had as a body corporate and its *remedies* derived from particular provisions in its charter. The summary trial is nothing more than a form of remedy given by its charter, and cannot be binding upon the courts of the United States. The proviso in the 16th section of the act of the 27th of February, 1801, only saves the *rights*, not the *remedies*, of the corporation.

Simms and *Swann*, contra.

The act incorporating the bank of Alexandria is a public act, and obligatory upon all the courts of Virginia. By the act of congress of the 27th of February, 1801, it is adopted, together with all the other laws of Virginia, as the law within the county of Alexandria; and is therefore as binding upon the circuit court of the district of Columbia, as it was upon the courts of Virginia; but lest any doubt should exist on the subject, the act of congress of the 3d of March, 1801, declares, that the circuit court of that district "*shall* possess and *exercise* the same *powers* and jurisdiction, *civil* and criminal, as is now possessed and exercised by the district courts of Virginia." There has never been a doubt but that the district courts of Virginia had jurisdiction in cases in which the bank was plaintiff, and was bound, if requested, to compel the defendant to go to trial at the return term. The clause in the charter of the bank is an exception to the general law upon the subject of judicial proceedings; but the exception is equally valid with the general rule.

Jones, in reply.

The bank has not brought the case within the act. The writ is not returnable until the return day, and the return day is not until after the rising of the

court; so that the bank is not entitled to a trial until the second term after issuing the writ. The writ is returnable to the *next* court; but the officer has the whole term to return it in, and may delay it until the very last moment of the session.

March 10.

MARSHALL, Ch. J. delivered the opinion of the court to the following effect:

The writ being returnable to the court, is returnable the first day of the court. It was known to the legislature of Virginia that the appearance day for all process was the day after the term. When, therefore, they directed that a trial should be had at the return term, they must have intended that this case should be an exception to the general rule.

Judgment affirmed.

YEATON *v.* THE BANK OF ALEXANDRIA.

The bank of Alexandria may maintain an action against the endorsor of a promissory note made negotiable in that bank, without first suing the maker, or proving him insolvent, although the endorsement was for the accommodation of the maker, and notwithstanding that in Virginia the implied contract

ERROR to the circuit court of the district of Columbia, in an action of *assumpsit* brought by the defendants in error against the plaintiff in error as endorsor of a promissory note for the accommodation of R. Young, the maker.

The declaration contained two counts. One upon the endorsement of the note, in the usual form, and without any averment of the insolvency of the maker, or of any steps taken to enforce payment from him. The other was for money had and received.

The same questions arose in this case as in the preceding case of *Young* v. *The Bank of Alexandria*, but the only question argued in this cause, was, whether an endorsor of a promissory note to the bank

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of the endorsor of a promissory note, by the general understanding of the country, is, that he will pay the debt, if by due diligence it cannot be obtained from the maker

Perhaps the undertaking of the endorsor of a note to a bank may be different.

of Alexandria, for the accommodation of the maker, was liable in an action by the bank, until after a suit, judgment and execution against the maker had proved fruitless, or the maker was otherwise proved to be insolvent.

Upon the opening of the point, MARSHALL, Ch. J. observed that it had been decided by this court in the cases of *French* v. *The Bank of Columbia*, (*ante*, *vol.* 4. *p.* 141.) and *Violet* v. *Patton*, at this term, that the circumstance of its being for the accommodation of the maker makes no difference. The endorsor is as much liable as if he had himself received the money.

Youngs, for the plaintiff in error.

It is no objection that the endorsement was for the accommodation of the maker. The consideration moving from the bank to the maker of the note, on the credit of the endorsor, charges both the maker and endorsor.

The general law of Virginia, upon the subject of promissory notes, is, that the endorsor is not liable until a suit has been brought against the maker, and judgment recovered; and the execution has proved fruitless, or the maker is otherwise proved to be insolvent. If there be any exception in favour of the bank it must be a privilege granted by its charter. The only words under which such a privilege can be supposed to exist are these: "And whereas it is absolutely necessary that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them, be it enacted, that when any person or persons *indebted* to the said bank on bonds, bills or notes, given or *endorsed* by them, with an express consent in writing that they may be negotiable at the said bank, shall refuse or neglect to make payment *at the time the same may become due*, and a suit shall be *thereupon* commenced against such *defaulter*, and a *capias ad respondendum* returned executed, or a copy left at the usual place of residence of such defaulter, at least ten days before the return day of such writ, the court shall" order the proceedings to be made up, and the cause tried at the first court.

But according to this act, the person to be sued must be a person *indebted* to the bank *by endorsement;* and under the general law of Virginia no person is *indebted by endorsement* of a note until the maker be insolvent, or the plaintiff shall have failed to obtain payment from the maker by suit, judgment, and execution.

Swann, contra, admitted the general law of Virginia respecting promissory notes to be as stated, but contended that by the words of the act of incorporation, an endorsor of a note is to be considered as indebted to the bank upon failure to pay the note when it becomes due. The preamble shows that punctuality in payment was the object in view; which would be entirely defeated if the bank could not compel payment from an endorsor until they had pursued the maker through all the tedious delays of the law. If the note be not paid when it becomes due, the act calls the endorsor a *defaulter*, and directs judgment to be entered up against him at the first court thereafter.

March 10.

MARSHALL, Ch. J. delivered the opinion of the court as follows, viz.

The question in this case is, whether the endorsor of a note negotiable in the bank of Alexandria, if such endorsement be for accommodation, may be sued by the bank, before a suit shall be instituted against the maker, if the maker be solvent.

In Virginia, the endorsor of a promissory note was not, when the town of Alexandria was separated from that state, liable to the holder by any express statute. He was only liable under the implied contract created by his endorsement. This implied contract, by the general understanding of the country, was, that he would pay the debt, if by due diligence it could not be obtained from the maker. This condition, however, was not express-

ed. Yet it was just, because it was consistent with general usage, and, therefore, was the real understanding with which such an endorsement was made and received.

But in banks, this is probably not the usage; and if it be not, then the same reason does not exist for annexing such a condition to the contract created by endorsement. If banks are understood to receive notes made negotiable with them, as subject to the law which governs inland bills of exchange, then it would seem reasonable, in the case of notes actually negotiated with them, to imply, from the act of endorsement, an undertaking conformable to that usage. If, then, the case showed that such was the usage of the bank, and such the understanding under which notes were discounted, this court is not prepared to say that the undertaking created by the endorsement would not be so fashioned as to give effect to the real intention of the parties.

But the incorporating act removes any doubt which might otherwise exist on this point.

The 20th section of that act declares, "that whenever any person or persons indebted to the said bank on bonds, bills, or notes, given or *endorsed* by them, with an express consent, in writing, that they may be negotiable at the said bank, and shall refuse or neglect to make payment at the time the *same* may become due, and a suit shall *thereupon* be commenced, &c. judgment is to be rendered in a summary manner.

A person, then, may become indebted to the bank on a note endorsed by him, as well as on a note made by him; and the question is, when does he become indebted. The act appears to answer this question in the succeeding member of the sentence. The words are, "and shall refuse or neglect to make payment *at the time* the *same* may become due." To what antecedent does the word "*same*" refer? Most obviously to the words "bond, bill or note." When the bond, bill or note becomes

due, the maker or endorsor, who shall refuse or neglect to make payment, is within the description of the act. No man can be said to refuse or neglect to make payment, before the money is demandable from him, and till then no action can be brought. But the law proceeds to say, "and a suit shall *thereupon* be commenced." The word "*thereupon*" must refer to the note, or to the circumstances previously stated. Give it the one meaning or the other, and the law obviously contemplates a suit against the maker or endorsor, on his refusing or neglecting to pay such note, when it shall become due. The act then proceeds to say, that, when this suit shall be so commenced, the court shall render judgment thereon in a summary way.

It is alleged that the preceding part of the section is all recital, and cannot, therefore, be construed to give a right to sue, where that right did not before exist: that the enacting clause gives no remedy where one did not before exist; but substitutes a summary mode of proceeding, for that more tedious action which the previous laws had given.

It is true that the first part of this section is recital; but it describes the precise case in which judgment shall be rendered in a summary way. That precise case is, where a person indebted, by making or endorsing a note negotiable and negotiated in the bank, shall refuse or neglect to make payment thereof, when such note shall become due. The time when he becomes indebted is declared to be, when the note becomes due.

It is alleged that an accommodation endorsor cannot then become indebted. This distinction was completely overruled in the case of Violet and Patton. The consideration moving from the bank to the maker of the note, on the credit of the endorsor, charges both the maker and the endorsor. The endorsor is, in this respect, as liable, both in reason and in law, to the claim of the bank, as if he had placed his name on the face instead of the back of the note.

Judgment affirmed with costs.

YEATON v. THE BANK, &c.

JOHNSON, J. Both the questions,* argued in this case, arise out of the act of Virginia incorporating the bank of Alexandria.

On the point of the summary jurisdiction, I concur with my brethren, and think this opinion perfectly consistent with the decision, at the last term, relative to the right of appeal. I remember that my opinion in that case was founded on the idea that the provisions of that act, relative to the summary recovery of debts, was entirely a judicial regulation. That the judicial power was unalienable from the sovereignty of a country, and must, therefore, in all its modifications, remain subject to the will of succeeding legislatures. That it was, in fact, a subject in which a peculiar, indefeasible right could not be vested in an individual. I thought it, therefore, from its nature, unaffected by the clause of the act of acceptance reserving to the bank its corporate rights, and of course affected by the law which gives an appeal, generally, from the courts of this district to the supreme court, above a certain amount. I have no doubt of the power of congress to deprive them also of their summary remedy; but it has not yet legislated to that effect.

On the other question, I entertain a very strong opinion in opposition to that of the court.

The doctrine has been repeatedly sanctioned in this court, that, in the state of Virginia, the holder of a promissory note cannot recover against an endorsor without proving the insolvency of the drawer. But it is contended that the act, incorporating this bank, has placed the notes negotiable therein on a different footing; and that an endorsor of such a note may be sued as soon as it is dishonoured, without any evidence of the insolvency of the drawer. The following are the words of the clause, so far as they are material to this case: "And whereas it is

* This case was argued in connection with that of *Young* v. *The Bank of Alexandria*, as one case. This opinion, therefore, applies to both cases.

absolutely necessary that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them, be it enacted, that whenever any person or persons indebted to the said bank on bonds, bills, or notes, given or endorsed by them, with an express consent in writing that they may be negotiable at the said bank, and shall refuse or neglect to make payment at the time the same may become due, and a suit shall be thereupon commenced against such defaulter, and a *capias ad respondendum* returned and executed, or a copy left at the usual place of residence of such defaulter, at least ten days before the return day of such writ, the court shall," &c. It then goes on and enacts, that, in such case, "the court shall order the proceedings to be made up, and the cause tried at the first court." This bare recital, or preamble, without one enacting word, is what is supposed to have effected this important change in the law of Virginia, relative to the liability of an endorsor. Much stress was laid, in the argument, upon the use of the word "indebted," as applied to the endorsor, the words "negotiable at the said bank," and words which suppose the commencement of a suit, as soon as a note "becomes due." I positively deny the correctness of maintaining any repeal or alteration in the principle of a law, upon an implication drawn from a mere preamble or recital to an act. Enacting words will undoubtedly often produce a repeal by implication, but a recital or preamble sets forth merely the motives or inducements of the legislator, and, whether founded in error or truth, serves no other purpose than to justify him to those for whom he is legislating, or, at times, to assist in developing the meaning of doubtful enacting words. Admit the principle, that a preamble may have the effect of enacting words, and there is no necessity for dilating on the inextricable absurdities in which a court may be involved. In the case before us, it is possible that the legislature may have supposed that the law of Virginia would sanction an immediate suit against the endorsor, without evidence of the drawer's insolvency;

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but their courts of justice have decided otherwise; and it would be singular if an erroneous opinion, entertained by that body, should have all the effects of a law passed by it. But there is not a word contained in this preamble which may not be fully satisfied, without producing any necessary implication against the general law of Virginia, relative to the liability of the endorsor.

When the legislature speaks of a person indebted by endorsement, it can only be understood to speak of one indebted according to the legal liability of an endorsor; which is only, by the laws of Virginia, in case of the insolvency of the drawer.

When it speaks of a consent in writing, that it may be negotiable at the said bank, it can only mean what it expresses; and intends it for the purpose of subjecting the individual to the summary recovery given in such a case; for, as to his general liability as endorsor, such a consent was in nowise necessary; that liability existed in its full extent without it.

And as to the supposition of the endorsor's liability to be sued when the note becomes due, this also is strictly and literally true, if the drawer should then be insolvent, or (I suppose) if he should become so at any time before the trial of the issue.

Upon the whole, therefore, it appears to me that there is no possible difference between the liablity of an endorsor generally, and an endorsor of a note negotiable in the bank of Alexandria; that the legislature intended to make no distinction; and, if it had expressly declared such to be its intent, no such change would have been produced, without following up that intention with sufficient enacting words; but that in fact, its sole object was to do that which it professes to intend, and alone has effected, viz. to give a summary remedy against all persons becoming indebted to that bank, whenever their legal liability is incurred. In fact it may, with the utmost correct-

ness, be affirmed of an endorsor that he is *indebted*, and that he may be sued when the note *becomes due*, without at all interfering with the laws of Virginia on this subject: for a thing may be *debitum in presenti*, and yet no cause of action exist against him; he may lie under a present obligation to pay a sum of money, upon some contingency or future event. And, with regard to his liability to be sued when the note becomes due, it may be very correctly affirmed that it is not due from him until the insolvency of the drawer can be shown. As to the drawer, the note is due when it is made payable; but the principles of the Virginia law add a contingency to the liability of the endorsor, so that, in fact, his undertaking is collateral and contingent, and the amount is not legally due from him until after the day of payment, and provided the drawer should prove insolvent.

THE HOPE INSURANCE COMPANY OF PROVIDENCE *v.* BOARDMAN ET AL.

ERROR to the circuit court for the district of Rhode Island, in an action upon a policy of insurance.

A corporation aggregate cannot be a citizen—and cannot litigate in the courts of the United States, unless in consequence of the character of the individuals who compose the body politic, which character must appear by proper averments upon the record.

The only question decided in this court was that relative to the jurisdiction of the courts of the United States.

The parties were described in the declaration as follows: "*William Henderson Boardman, and Pascal Paoli Pope, both* of Boston, in the district of Massachusetts, merchants and *citizens of the State of Massachusetts*, complain of *The Hope Insurance Company of Providence, a company legally incorporated by the legislature of the State of Rhode Island and Providence Plantations, and established at Providence in said district.*"

HOPE INS. Co. &c. v. BOARDMAN.

The question of jurisdiction was not made in the court below.

Ingersoll, for the plaintiffs in error, contended, that the jurisdiction must appear upon the face of the proceedings, according to the decision in the case of *Bingham* v. *Cabot*, 3 *Dal.* 382. And that it does not appear upon this record that the parties are citizens of different states; a corporation aggregate cannot be a *citizen of any state;* and here is no averment of citizenship of the individuals who compose the corporation.

Adams, contra.

The whole argument against us depends upon the single case of *Bingham* v. *Cabot;* for although in other cases the same point has been decided, yet the subsequent decisions are all founded upon that case. The effect of that decision has been to exclude many cases upon nice questions of pleading, which would otherwise have been clearly within the jurisdiction of the courts of the United States. No exception was taken to the jurisdiction in the court below; and this court would not willingly turn us out of court, after encountering all the risk, expense, delay and labour of a jury trial, upon an exception, which, if taken in the first instance, might have prevented all that risk, expense, and delay. In the case of *Abercrombie* v. *Dupuis*, (*ante*, *vol.* 1. *p.* 343.) the present Chief Justice (*Marshall*) intimated a doubt how the question would then have been decided if it were a new case, and if the court was not bound by the case of *Bingham* v. *Cabot*. This doubt shows that the court was not then inclined to extend the principle farther than that case warrants. At the time the court decided the case of *Bingham* v. *Cabot*, the jurisdiction of the courts of the United States was an object of jealousy, and there was probably a desire on the part of the court to remove all ground of suspicion, by deciding doubtful cases against the jurisdiction. This circumstance probably induced them to be over scrupulous upon that

subject. But it is as much the duty of this court to exercise jurisdiction in cases where it is given by the constitution and laws of the United States, as to refuse to assume it where it is not given.

The person who drew the declaration in the present case seems to have been aware of the decision in the case of Bingham v. Cabot, and to have intended to describe the parties in such a manner as to give the court jurisdiction. The defendant is described as "*a company legally incorporated by the legislature of the State of Rhode Island and Providence Plantations, and established at Providence in the said district.*"

The term *citizen* could not with propriety be applied to a corporation aggregate. It could only be a citizen by *intendment of law*. It is only a moral person; but it may be a citizen *quoad hoc*, *i. e.* in the sense in which the term *citizen* is used in that part of the constitution which speaks of the jurisdiction of the judicial power of the United States. The term is indeterminate in its signification. It has different meanings in different parts of the constitution. When it says "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," the term *citizens* has a meaning different from that in which it is used in describing the jurisdiction of the courts.

To say that all the individual members of a body corporate must be citizens of a certain description, destroys the idea of a body politic. It is the body politic, the moral person, that sues; and not the individuals who compose the corporation. Its powers, its duties and capacities are different from those of the individuals of whom it is composed. It can neither derive benefit from the privileges, nor suffer injury by the incapacities, of any of those individuals.

Thus the infancy of any or even of all the members of a body corporate does not affect the validity of its acts. Nor does the alienage of the members

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prevent the body politic from holding lands. A majority of the members of the bank of the United States are aliens.

The objection goes to exclude all corporations aggregate from the federal courts. For if a corporation cannot be a citizen it cannot be an alien. And as the individual members are constantly changing by the transfer of stock, it is impossible to ascertain at any precise moment who are the individuals who constitute the corporate body; and it would at any time be in the power of a corporation defendant to evade the jurisdiction of the court, by taking in a new member who should be of the same state with the plaintiff.

At all events it is an objection which ought to be pleaded in abatement according to the course of the common law, so that the plaintiff may have a better declaration; and by that means much expense, time and labour would be saved.

The reason of giving jurisdiction to the courts of the United States in cases between citizens of different states, applies with the greatest force to the case of a powerful moneyed corporation erected within, and under the laws of a particular state. If there was a probability that an individual citizen of a state could influence the state courts in his favour, how much stronger is the probability that they could be influenced in favour of a powerful moneyed institution which might be composed of the most influential characters in the state. What chance for justice could a plaintiff have against such a powerful association in the courts of a small state whose judges perhaps were annually elected, or held their offices at the will of the legislature?

If the jurisdiction of the federal courts is limited by the letter of the constitution, they have no jurisdiction in a case between a citizen of one state and a citizen of another state; because the constitution speaks of *citizens*, in the plural, so that there must

be more than one plaintiff, and more than one defendant. So also there could be no jurisdiction if one of the parties was a woman, because a woman cannot be a *citizen;* which is a term applicable only to a *male*.

It is not necessary that a person should be a *citizen* to commit treason: it may be committed by an alien.

Judge Jay, as an argument in favour of the *suability* of the states, urged that a corporation could undoubtedly be sued in the courts of the United States.*

THE COURT having, in the case of *The Bank of the United States* v. *Deveaux et al.* decided that the right of a corporation to litigate in the courts of the United States depended upon the character (as to citizenship) of the members which compose the body corporate, and that a body corporate as such cannot be a citizen, within the meaning of the constitution, *reversed the judgment*, for want of jurisdiction in the court below.

* A similar question of jurisdiction being involved in the case of *The Bank of the United States* v. *Deveaux et al.*, and the counsel in that case expressing a wish to be heard before this case should be decided, the court agreed to hear both cases at the same time; the further arguments in this case were consequently blended with those in the other.

THE BANK OF THE UNITED STATES *v.* DEVEAUX ET AL.

ERROR to the circuit court for the district of Georgia.

A corporation aggregate, composed of citizens of one state, may sue a citizen of another state in the circuit court of the United States.

The declaration, or *petition*, as it is there called, was as follows:

District of Georgia.

To the honourable the judges of the sixth circuit

BANK U. S. v. DEVEAUX.

court of the United States, in and for the district aforesaid.

Where the jurisdiction of the courts of the United States depends, not on the character of the parties, but upon the nature of the case, the circuit courts derive no jurisdiction from the judiciary act, except in the case of a controversy between citizens of the same state claiming lands under grants from different states.

No right is conferred on the bank, by its act of incorporation, to sue in the federal courts.

A corporation aggregate cannot, in its corporate capacity, be *a citizen.*

The petition of *The President, Directors and Company, of the Bank of the United States, which said bank was established under an act of congress entitled "An act to incorporate the subscribers to the Bank of the United States," passed the 25th day of February*, 1791, *showeth*,

That Peter Deveaux and Thomas Robertson, both of the city of Savannah, Esquires, have endamaged your petitioners in the sum of three thousand dollars, for this, to wit, that the said Thomas Robertson, then acting under authority from the said Peter Deveaux, on the 20th day of April, 1807, at Savannah, in the district aforesaid, and within the jurisdiction of this honourable court, with force and arms entered into *the house and premises of your petitioners*, at Savannah aforesaid, and then and there seized, took, and detained, two boxes (the goods and chattels of your petitioners) containing each one thousand dollars in silver, then and there found in the possession of your petitioners, and being of the value of two thousand and four dollars, and carried the same away, and converted and disposed thereof to their own use, and other wrongs to your petitioners then and there did against the peace of the *district*, and to the great damage of your petitioners, therefore your petitioners say they are injured, and have sustained damage to the value of three thousand dollars, and therefore they bring suit. *And your petitioners aver that they are citizens of the State of Pennsylvania*, and the said *Peter Deveaux and Thomas Robertson are citizens of the State of Georgia.* Wherefore your petitioners pray process, &c.

And the said Peter and Thomas, by R. L. their attorney, come and defend the force and injury, when, &c. and pray judgment of the declaration aforesaid, because they say that the sixth circuit court of the United States ought not to have and

entertain jurisdiction of the said declaration, and the matters therein contained, for that the said president, directors and company of the bank of the United States aver themselves to be a body politic and corporate, and that in that capacity these defendants say they cannot sue or be sued, plead or be impleaded in this honourable court, by any thing contained in the constitution or laws of the same United States, and this they are ready to verify; wherefore, for want of jurisdiction in this behalf, they pray judgment, and their costs, &c.

To this plea there was a demurrer and joinder, and judgment in favour of the defendants upon the demurrer.

Binney, for the plaintiffs in error.

In the year 1805 the State of Georgia passed a law to tax the Branch Bank of the United States, at Savannah. The bank having refused to pay the tax, the state officers entered their office of discount and deposit, and took and carried away two thousand dollars, for which the bank of the United States brought their action of trespass in the circuit court of the United States for the district of Georgia. The plea to the jurisdiction does not deny that the plaintiffs were citizens of the State of Pennsylvania, but relies upon the fact that the plaintiffs sue as a body corporate.

The record presents two questions.

1. Whether a body politic, composed exclusively of citizens of one state, can sue a citizen of another state in the circuit court of the United States.

2. Whether the bank of the United States has not a peculiar right to sue in that court.

The objections to this right are two.

1. That the individual character of the members

is so wholly lost in that of the corporation, that the court cannot take notice of it.

2. That the suit being in a corporate capacity, it is impossible by the pleadings to bring into question the fact of citizenship of the individual members.

The answer to the *first* objection embraces three propositions.

1. That in many instances, the character, situation and attributes of the members of a corporation, are brought into notice in judicial proceedings against the corporate body.

2. That even if it were otherwise, still the spirit of the federal constitution and laws demands, that the citizenship of the members should be noticed, as well to affect the question of jurisdiction, as for other purposes.

3. That the constant practice in the circuit courts, and the tacit approbation of this court, have sanctioned their jurisdiction in such cases.

1. What is a corporation aggregate? It is a collection of many individuals united into one body, under a special name, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting in several respects as an individual. 1 *Kyd. on Corp.* 13. To say that it is an "*ens civile*, a *jus habendi et agendi*, an *ens rationis*, a *mere metaphysical being*, and that it rests only in consideration and intendment of law," are terms calculated to mislead the understanding.

A corporation is composed of natural persons; it is a visible, tangible body; and although the whole collectively have faculties in law which the individuals have not, yet it does not follow that the whole body may not be seen, examined, sifted, and contemplated, as any other body of individuals having

collectively a particular faculty. 11 *Co.* 98. b. The individuals hold their rights as members in their *natural*, and not in a *politic* capacity. A corporation is a mere collection of men having collectively certain faculties.

When the president, directors and company of a bank are assembled, the corporation is visible. If all the members should die, or surrender their charter to the king, the corporation would be extinct. A corporation must exist by means of natural persons; and the law will examine whether the natural persons claiming to be members have all the necessary qualifications according to their charter. If any individual member does not possess them, he is to be disfranchised.

If a suit were brought against a corporation it would be a decisive bar that all the members were dead.

A corporation as a "faculty" has no "local habitation," though it has a "name." If it is an *ens rationis* only, it cannot be said to reside anywhere; and it certainly occupies nothing; yet *habitancy*, residence, and occupation may be predicated of a corporation aggregate. The residence and inhabitancy of the particular members have been taken into consideration, and have been deemed to impart these characters to the corporation.

Lord Coke, in his exposition of the statute of 22 *Hen.* VIII. *c.* 5. concerning the repairing of decayed bridges in highways, (2 *Inst.* 697. 703.) says, "the persons to be charged by this act are comprehended under this only word "*inhabitants.*" "Every corporation and body politic *residing* in any county," &c. "or having any lands or tenements in any shire," &c. "*quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there within the purview of this statute." In the case of *Rex* v. *Gardner*, *Cowp.* 83. it was decided that a corporation aggregate was an inhabitant or occupier of

certain lands, and therefore liable to be taxed for them under the act of 43 *Eliz. c.* 2.

It must be an inhabitant or resident where its members or officers inhabit or reside. If an action be brought against the corporation in respect of its residence or occupation, it must be competent to the corporation to show that it does not so reside or occupy, which can only be done by showing that this is not true of its members or officers.

But the characters of individual members are in many cases examined for the purpose of settling the very question of jurisdiction.

The division of corporations into *ecclesiastical* and *lay*, is familiar. There is nothing in the name or patent to distinguish them. 1 *Bla. Com.* 470. An ecclesiastical corporation is subject to the *ordinary* alone. His court alone has jurisdiction of proceedings by or against the corporation. 1 *Bla. Com.* 480. A *lay* corporation is visited by the founder. The king is the founder of all civil corporations, and he visits them in the king's bench.

By ascertaining the characters of the members of the corporation alone can it be decided whether the corporation be *lay* or *ecclesiastical;* and, consequently, whether the king's bench or the ordinary has jurisdiction. Blackstone says, that an ecclesiastical corporation is where the members that compose it are *entirely* spiritual persons; and that the universities of Oxford and Cambridge are not ecclesiastical corporations, "*being composed of more laymen than clergy.*" In this question of jurisdiction, therefore, is always involved the character of the individual members who compose the body.

The members of a corporation are further noticed in chancery, and are compelled as individuals to execute a trust, which at common law they were not bound to do. *Gilb. Uses*, 5. 174. 1 *Kyd*, 73. 2 *Leon.* 122. A corporation trustee is the same in chancery

as an individual, or number of individuals. 2 *Ves.* jun. 46. *Attorney-General* v *Foundling Hospital.*

The rule seems to be, not that the individuals confer their private privileges upon the body corporate, but that as often as justice or convenience require that the corporation should be considered as composed of natural persons, the individuals are disclosed, and their character becomes the subject of legal contemplation.

2. The spirit of the constitution and laws of the United States, demands that the citizenship of the members of a corporation should be noticed in order to decide the question of jurisdiction, as well as for other purposes.

The constitution has conferred on the courts of the United States jurisdiction in two classes of cases.

1. Where the peace of the confederacy might be involved.

2. Where the state tribunals could not be supposed to be impartial.

The one upon the ground that the union was answerable for the misconduct of its members, who, by unjust decisions against aliens, might furnish a just ground of war.

The other to preserve the real equality of citizens throughout the union, by guarding against fraudulent laws and local prejudices, in particular states.

The design of the constitution was to retain jurisdiction in those cases where substantially these great interests were to be affected. It cannot be supposed that it was to be *retained* only where there was a *nominal* character, *alien* or *citizen*, and abandoned where substantially aliens or citizens were concerned, but whose names did not appear. It is unimportant by what name citizens are by the laws

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of their own state *permitted to sue*, they are still citizens, and entitled to that substantial justice, and the benefit of those independent tribunals, which were intended to be secured by the federal constitution. The constitution does not speak of the *name on record;* of the *nominal* party; it speaks of "*controversies*" "between citizens of different states." The question is not, what *names* appear upon the record, but between whom is the *controversy;* who are the *real litigants*.

In conformity with the spirit of the constitution, the federal courts have always inquired after the real parties. Although the nominal parties are really persons competent to sue in those courts, yet they will inquire into the character of the real litigants, and if they find *them* unable to sue there, they will dismiss the suit. 4 *Dal.* 330. *Mansfield's Lessee* v. *Levy*. They will allow no fiction to give jurisdiction to the court where the substance is wanting. Can it be admitted then that they will allow the jurisdiction to be excluded by a name, if the substance exists which gives jurisdiction?

If a state be substantially a party, is the jurisdiction cut off if her agent brings a suit? The case of *Fowler* v. *Lindsey*, 3 *Dal.* 412. clearly implies the contrary.

It is the privilege of *citizens* of one state to have their controversies with citizens of another state tried in the federal courts. The constitution guaranties it to them. It cannot be taken away, because they are authorized to bring one joint suit in a particular name, instead of bringing it in the names of each individual. Their corporate name is given them as a benefit, and ought not to be converted into an injury. Besides, if the bank cannot sue, they cannot be sued in the federal courts; nor any other corporation. The consequence is, that if a citizen of Georgia would sue the bank of the United States, at Philadelphia, he must go into the state courts. If he would sue the corporation of Philadelphia, he must

sue in the state courts; nay, even in the county court of Philadelphia itself.

But it is not more a question of jurisdiction than of right. If you cannot inquire who are the members of a corporation, whenever a right depends upon the question of citizenship, that right cannot be enjoyed by a corporation.

If *citizenship* of the members cannot give jurisdiction, neither can their *alienage*. A corporation composed of aliens cannot sue in the federal courts. Neither the *East-India Company*, *the Bank of England*, nor even a sole corporation, such as the Chamberlain of London, can sue in those courts; for in his corporate capacity he is not an alien.

An alien cannot sue a domestic corporation unless in the state courts. Although you permit an obscure alien to sue a citizen in the federal courts, yet you deny that privilege to a corporation consisting of a great number of aliens.

Again: by the constitution, the jurisdiction of the federal courts is to extend to "controversies between citizens of the same state, claiming lands under grants of different states;" yet a corporation of Pennsylvania claiming lands under Virginia, against a citizen of Pennsylvania claiming the same lands under Pennsylvania, must go into the courts of Pennsylvania, and cannot get into the federal courts.

This would be a result clearly contrary to the intention and spirit of the constitution, which meant that no man claiming land by title adverse to a state should be obliged to resort to the courts of that state to try his title.

The argument from inconvenience is very strong. Lord Coke says *plurimum valet*. When other reasoning is nearly on an equipoise, it ought to turn the scale.

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The court cannot consider the individual members as citizens for *any* purpose, if it cannot for that of jurisdiction.

How is it under the act of congress for registering vessels? *Laws of the U. S. vol. 2. p.* 147. A corporation cannot hold an American registered vessel. An insurance company to whom an American vessel is abandoned must forfeit her register, although every member of that corporation be an American citizen. A foreign corporation, although composed entirely of aliens, may yet hold lands in this country, although *an alien* cannot.

3. The practice of the courts of the United States has been uniform and never questioned. This court has decided a great number of cases in which a corporation has been a party. It is no answer to these to say that there was no plea to the jurisdiction; for none was necessary. Whenever the court sees that it has not jurisdiction, or that its jurisdiction does not appear upon the record, it dismisses the suit. And in every case where a corporation is a party, the title of the suit alone was sufficient to give the court information.

But this point may be considered as almost, if not quite, decided by the case of *The Bank of North America* v. *Turner*, 4 *Dal.* 8. where the plaintiffs were described in the same manner as the present plaintiffs, and *Ch. J. Ellsworth*, in delivering the opinion of the court, says, "the plaintiffs are *well described* as citizens of Pennsylvania."

The second objection is, that by no form of pleadings can the citizenship of the members be put in issue.

But if the citizenship be material, it may be averred; and if averred, it may be put in issue. The materiality of the averment is indeed the only question.

2. The second question upon this record is, whether the bank of the United States has not a peculiar right to sue in the federal courts?

This right depends upon two questions;

1. Whether congress could, under the constitution, give such a jurisdiction to the circuit courts? And,

2. Whether congress *has* given it?

1. The judicial power of the United States is coextensive with the legislative. It extends to *all* cases arising under the laws of the United States. Every case in which the bank of the United States is a party must be a case arising under those laws; for the only capacity which the bank has to sue or be sued is derived from a law of the United States. No contract can be made with the bank, no trespass can be committed upon its property, without involving the question of its existence as a corporate body, and of its rights, powers and duties, all of which depend upon the laws of the United States.

Congress, therefore, had a right to give to the circuit courts of the United States cognisance of all cases in which the bank should be a party.

2. Have they done it?

The 3d section of the act of congress which incorporated the bank, gave them the power and capacity "*to sue*" "*in courts of record, or any other place whatsoever.*"

If they have a right to sue in courts of record, can it be presumed that congress meant to exclude them from the courts of the United States? the only courts over whom congress could exercise any control, and to whom alone they could imperatively impart jurisdiction. If the bank has a capacity to sue in the circuit courts, the circuit courts are bound to take cognisance of their suits.

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The presumption that congress meant to give such jurisdiction to the circuit courts is fortified by the reasonableness of the jurisdiction, the extensiveness of the institution, and its character as an agent in the fiscal operations of the United States; by the danger of an attack from some of the states; by the jealousies of state banks; by the inconvenience of discordant decisions upon the construction of their charter, and the certainty that all cases in which the bank is a party must involve questions arising under the laws of the United States.

P. B. Key, contra.

Two questions arise in this case.

1. Whether a body politic, a corporation aggregate, created by a law of the United States, is competent to sue in the circuit courts of the United States.

2. Does the averment of citizenship give jurisdiction to those courts.

1. The first point depends upon the constitution and laws of the United States.

The 2d section of the 3d article of the constitution designates the limits of judicial authority which congress could confer on the several courts of the United States, but it confers no powers on the circuit courts. It defines the limits which neither congress, nor the courts erected by congress, can transcend. It was within the discretion of congress to organize courts, and grant them powers to the whole extent of the constitution; but they were under no obligation to do it.

The question then, is, not what powers might congress give to the circuit courts, but what have they given.

By the *judiciary law of* 1789, *vol.* 1. *p.* 55. § 10. the circuit court has original cognisance of civil

suits, in *three* cases only. 1. Where the United States is plaintiff; 2. Where an *alien* is a party; and, 3. Where the suit is between a citizen of the state where the suit is brought, and a citizen of another state.

The president, directors and company of the bank of the United States do not answer to either of those cases. They are neither the United States, nor an alien, nor a citizen of a state.

They are a corporation aggregate, consisting of many natural persons, created by the act of congress of the 25th of February, 1791, *vol. 1. p.* 283. under the name and style of "The President, Directors and Company of the Bank of the United States," and by that name only can they sue and be sued. The present suit is brought by them in their corporate name and capacity.

A corporation aggregate is an *artificial, invisible* body, existing only in *contemplation of law.* It has no analogy to a natural person. It has no organ but its *seal.* It cannot sue, or be sued, for any personal injury. It cannot be outlawed. It is not subject to an attachment of contempt. It never dies. It cannot be a citizen of any state, because it cannot owe allegiance. It cannot commit treason nor felony. It can have no residence, because it is an artificial, invisible, intangible body. It cannot appear in person, but must appear by attorney. For all these reasons it cannot come within the description of those who are entitled to sue in the circuit courts of the United States. Neither residence nor inhabitancy is sufficient to give jurisdiction. It must be a *citizen*, possessing political rights, and owing allegiance to some state.

The bank has mistaken its proper course. Wherever the only ground of jurisdiction is a question upon the construction of the constitution, or of a law, or treaty of the United States, the only remedy is by writ of error from this court to the high-

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est state tribunal having cognisance of the cause, agreeably to the provisions of the 25th section of the judiciary act of 1789. *Vol.* 1. *p.* 63.

If an act of congress could authorize any person to sue in the federal courts, on the ground of its being a case arising under a law of the United States, it would be in the power of congress to give unlimited jurisdiction to its courts. But it is only when the state courts disregard or misconstrue the constitution, laws, or treaties, of the United States, that the federal courts have cognisance under that clause of the constitution which declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.

It is supposed to be absurd to say that the United States have erected a body corporate, and given it a power to sue and be sued in any courts but those of the power creating the corporation. But there is nothing absurd in the idea. Persons are daily becoming citizens of the United States, under an act of congress, and yet they have no right to sue in the federal courts except in particular cases, and under special circumstances; if the bank can bring itself within one of those cases, and clothe itself with those special circumstances, it may sue in those courts.

But it is contended that it has brought itself within one of those cases, by the averment that the president, directors and *company* of the bank of the United States are citizens of the state of Pennsylvania, and the defendants citizens of the state of Georgia.

This averment cannot give jurisdiction; because,

1. It is repugnant and void; and,

2. It is contrary to their own showing on the face of the declaration.

1. It is repugnant because the suit is brought in the corporate name. The corporation is the plaintiff,

and it is absurd and impossible to say that a corporation aggregate is a citizen or citizens. The body politic is the plaintiff, and not the individual stockholders.

2. It is contrary to their own showing, because they have in the declaration expressly averred themselves to be a body corporate, and to sue in that capacity; and an averment relative to the individual characters of the stockholders is in contradiction to the corporate character in which they sue. No corporation aggregate can derive aid from the personal character of its members; nor does it incur any disability from the disabilities of the individuals who compose the society. Neither the infancy, coverture, nor outlawry of the individuals can affect the body corporate.

It is laid down in the books that "an averment contrary to that which appears to the court, shall not avail." *Com. Dig.* tit. *Pleader.*

But it is said that you may raise the veil which the corporate name interposes, and see who stand behind it. You may strip them of the corporate capacity in which they sue, to give the court a jurisdiction which they cannot claim in their corporate capacity.

But the name of a corporation is not a mere accident. It is *substance.* It is the *knot* of its combination. It is its *essence.* It is *the thing itself.* 1 *Tuck. Bl.* 474, 475.

As to the case of ejectment from 4 *Dal.* 333. the nominal plaintiff must have the same character, as to citizenship, as his lessor; and the court will be *astute* to see that no deception be practised upon them to give them a jurisdiction which they could not otherwise exercise.

The authority from 2 *Inst.* 697. only proves that a corporation aggregate may be adjudged to be an

inhabitant in respect to its holding of lands, and so as to render those lands liable to taxes for the repair of bridges and highways under the statute of 22 *H.* VIII. *c.* 5.

In the case of *The King* v. *The Inhabitants of St. Bartholomews*, in 4 *Burr.* 2435. Lord Mansfield said the corporation were not *occupiers*. And in *Rex* v. *Gardner*, *Cowp.* 84. the question was whether a corporation, seised in fee for its own profit, was ratable to the poor, under a law which taxed all *inhabitants*. The court decided that inasmuch as persons seised in fee were always assessed as inhabitants of the land, if there was no other tenant upon it, a corporation seised in fee should, *pro hac vice*, be deemed an inhabitant within the meaning of that statute. But this goes but a little way towards proving that a corporation aggregate may be a citizen for the purpose of giving jurisdiction to the federal courts; or towards establishing the point that the court will inquire into the individual circumstances of the members of a corporation, for the same purpose.

Of still less weight is the doctrine respecting the *visitatorial* power in England. That power is given for the express purpose of examining the *qualifications* of the members, to see whether the charter of the corporation has been adhered to in the election of members, and whether the corporation has acted consistently with the purposes of its creation. It is not a power to examine the character of the individuals to ascertain whether the corporation has a right to sue in a certain court.

At law, a corporation cannot be a trustee. And a court of equity acts *in personas* to compel the members to perform their corporate functions; but even this doctrine depends upon the mere *dictum* of a lord chancellor.

In the case cited from 4 *Dal.* 8. the question respecting the averment of citizenship was not raised. The gentlemen of the bar were not very

desirous of raising questions as to the jurisdiction of the federal courts.

If denial of justice be a cause of war, as is alleged, the person who claims it must preserve an *entirety* of character; he must not associate himself with others who have no right to claim it in that form. Foreign nations have no right to prescribe the *mode* of administering justice to their subjects in this country. If they have the same resort to the same courts which our own citizens enjoy, they cannot complain.

But it is said that the death of all the members of a corporation is a fact which may be pleaded; that cannot be pleaded unless you can go into the question who were the last members of the corporation. And if you can plead any thing respecting the individual members, you may plead their citizenship. But if this be true, it must be pleaded in a different manner. The name of each individual must be set forth, and his death averred. And it may well be doubted whether even such a plea would be good; and whether the only remedy would not be by *quo warranto;* or a rule to show cause.

If the averment in the declaration relate to the body politic, it is repugnant. If to the individual members, it is immaterial. No issue could have been taken upon it. It does not name a single individual member of the corporation. If they had named every individual, it would have appeared that some of them were citizens of Georgia. If the defendant had pleaded that *A. B.*, one of the members, was a citizen of Georgia, it would have been a bad plea, because immaterial and argumentative.

Jones, on the same side, cited *Co. Litt.* 66. b. 10 *Co.* 32. b. 1 *Ld. Raym.* 80. 2 *Cranch*, 445. 2 *Burr.* 1054. 1 *Bl. Com.* 497. 512. 10 *Co.* 30. 1 *Bl. Com.* 502. 1 *Leach's Cr. Law*, 287.

This cause being argued in connection with the

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cases of *The Hope Insurance Company of Providence* against *Boardman et al.*, *ante*, p. 57. and *The Maryland Insurance Company* against *Wood*, *post*, in the latter of which Mr. Harper was counsel for the defendant in error, he was permitted to reply to the arguments of the plaintiffs in error in this case.

Harper, in reply.

The point of jurisdiction gives rise to two questions.

1. As to the form of the averment.

2. As to the effect of the incorporation on the original character of the members.

1. In the case of The Maryland Insurance Company against Wood, the averment is, "*The Maryland Insurance Company, citizens of the state of Maryland.*"

This does not mean that the corporation, as such, is a citizen of Maryland, but that the individuals who compose it are citizens. It is the same thing in substance as to say, "The Maryland Insurance Company, a corporate body composed of persons who are citizens of Maryland."

It is objected that such an averment cannot be true; but it is surely possible that all the members of a corporate body may be citizens of one state; and with regard to insurance companies it is almost always true. But if not true, the contrary may be shown.

It is also objected that the averment is defective, because it does not name the individuals who are affirmed to be citizens.

But it may be answered that they need not be named, because they have authority to join in the

suit in their corporate name, and therefore in that name may make the averment. There is no uncertainty, because it is averred that they are *all* citizens. But if it were necessary to aver that *some* were citizens, in that case it would be necessary to show who they were. If the fact be not as averred, it may be pleaded, and the plea may state that A., B. and C. are members of the corporation, and are citizens of another state.

2. As to the effect of the incorporation.

The question is not whether a corporation can be a citizen in its corporate capacity.

But whether, by becoming members of the corporation, the individuals who compose it lose, in their corporate affairs, those privileges which as individuals they possessed before.

This leads us to inquire into the nature and objects of an incorporation.

1. Of its nature.

It is a *privilege* conferred on a number of *individuals*. The corporate body is the *form* under which the privilege is enjoyed and exercised. The individuals are the *substance*. It is a *fiction* of law; the individuals are the *real parties*. It is a *trustee;* the individuals are the *cestui que trusts*.

It is a privilege conferred and accepted. But neither the grant nor the acceptance deprives the party accepting it of other privileges which he before possessed, unless they be incompatible with each other.

Thus the law confers on infants the privilege of being free from the obligation of their contracts; and it takes from them the privilege of acquiring rights under those contracts, because these two privileges are incompatible; but it does not take

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from them the privilege of suing for rights derived otherwise than from their contracts.

So a woman, by entering into wedlock, acquires the privilege of being free from arrest for debt. And she renounces the privilege of making contracts, because that would be incompatible; but she does not renounce the privilege of taking land by descent, gift or devise.

So a man, by entering into civil society, acquires the privilege of being protected by the society; and he renounces the privilege of seeking, by his own force, redress for his wrongs, because incompatible. But he does not renounce the privilege of defending himself against personal violence.

The privileges of a corporation are,

1. To sue and be sued by a corporate name.

2. To have perpetual succession by the transfer or transmission of the shares, &c.

3. To make contracts by which the separate property or persons of the individuals shall not be bound.

These privileges are not incompatible with that now claimed.

But an incorporation is not only a privilege, but it is a privilege conferred on *individuals*. Individuals are the basis and essence of the corporation. It cannot subsist without them. The law must take notice of them. It must take notice of their character and privileges as individuals. The existence of the corporate body cannot be known without taking notice of the individuals. The most important of its privileges, that of perpetual succession, depends upon it.

If the law cannot notice the privileges of indi-

viduals, neither can it notice their obligations or disabilities.

It may happen that all the members of a corporation may be infants or *femes covert*. Suppose in an action brought by this corporation the statute of limitations should be pleaded, could not the plaintiff reply the infancy or coverture?

Again, suppose a corporation to have existed and made a contract in Pennsylvania with a citizen of Maryland; suppose that all the members came into Maryland, and after remaining there some time returned to Pennsylvania; and that three years afterwards the corporation brought suit in Maryland, on the contract; could not the statute of limitations be pleaded? And if the plaintiffs should reply absence from the state, might not the defendant rejoin the special matter?

Suppose all the members of a corporation to be outlawed, could not the outlawry be pleaded to an action brought by the corporation?

Suppose the corporation to hold land, and all the members to be attainted of treason, would not the land be forfeited?

Suppose a corporation to be composed entirely of alien enemies, could such a corporation sue? Might not the special matter be pleaded?

The corporate body is the *form;* the individuals are the *substance*. The purpose of the incorporation is to enable *individuals* to transact business more conveniently for their mutual benefit. Individual benefit is the object. The incorporation is the instrument and means, like the fictitious lessee, and casual ejector, in ejectment.

The construction contended for would sacrifice the

substance to the form, and would make the means defeat the end.

The corporation is a *fiction* of law; the individual members are the *real parties*. But fictions of law are introduced for the *benefit* of the real parties, not for their *injury;* and they are to be so moulded as to answer the purpose. Fictions of law never must shut out the truth. But the construction contended for would set up a fiction against the truth. The parties here are in fact citizens of different states; but this *fiction*, it is said, must preclude them from averring the *fact*.

The corporate body is a *trustee*. The individual members are the *cestui que trusts*. It is like infant and *prochein ami*.

Suppose a man, seised in fee of lands in Pennsylvania, mortgages it to a citizen of that state, and then devises it in fee to a citizen of Maryland in trust for a *feme covert* also a citizen of Maryland and her heirs. The trustee dies, and his heir on whom the trust descends, is a citizen of Pennsylvania. The *feme covert* dies, leaving issue citizens of Maryland, upon whom the trust estate descends.

Cannot the issue, joining the heir of the trustee, bring a bill to redeem in the circuit court of Pennsylvania? Would not the court look to the real parties?

Again, suppose an infant citizen of Maryland sues in the circuit court of Pennsylvania, by a *prochein ami* who is a citizen of Pennsylvania, has not that court jurisdiction of the case?

2. Of the object of the incorporation.

It is to confer additional privileges and advantages, not to take away those formerly held. To the privilege of suing in the federal courts in their in-

dividual capacity, was superadded the privilege of so suing in their corporate capacity.

The true construction is, that they should sue and be sued in their corporate capacity, to the whole extent, and in as beneficial a manner, as in their individual capacity.

The construction contended for would restrict the privilege of suing; and would take away one of its most important properties.

One great object in allowing citizens of different states to sue in the federal courts, was to obtain a uniformity of decision in cases of a commercial nature. The most numerous and important class of those cases, and the class in which it is most important to have uniform rules and principles, is that of insurance cases. They are almost wholly confined to corporations, though most frequently, in fact, between citizens of different states.

Ingersoll, on the same side, and also in reply to the argument of Mr. Adams, in the case of The Hope Insurance Company v. *Boardman et al.*

The character of the corporation must follow the character of its members. The averment of the citizenship of its members is sufficient. But it is clear that a corporation aggregate cannot be a citizen. An averment of *residence* is not sufficient. 1 *Cranch*, 343. *Abercrombie* v. *Dupuis*. The place of its establishment does not make it a citizen. It is not necessary, under its charter, that all the members of The Hope Insurance Company of Providence should be citizens of the state of Rhode Island. The declaration in that case does not even aver either the corporation or its members to be citizens of any state whatever. If any one of the members be a citizen of the state in which the suit is brought, the federal court has no jurisdiction. 3 *Cranch*, 267. *Strawbridge* v. *Curtiss*.

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It is a bold proposition to say that no corporation can sue in the federal courts. It would be in hostility to the spirit of the constitution, and would deprive the citizens of one state of that chance of justice in their contests with citizens of another state, which the constitution intended to secure to all; and this merely because they have been enabled to sue under a fictitious name.

Every corporation aggregate must be composed of natural persons, and courts of law will take notice of them as members of the corporate body. If a suit be brought by or against the inhabitants of an incorporated town, the court will inquire whether any of the jurors or witnesses are inhabitants. So a corporate body may own an American registered ship, and one of the corporation may take the necessary oaths.

Numerous cases have already been decided in the federal courts, in which a corporation has been a party, involving the right of property to the amount of millions. What will become of all these cases? In all the cases within the last five years writs of error will be brought.

In ejectment, the court, on a question of jurisdiction, always inquires who are the real parties.

The constitution declares that the judicial power shall extend to "*controversies*" "between citizens of different states." It is necessary, therefore, that the court should inquire between whom the real controversy exists.

March 15.

MARSHALL, Ch. J. delivered the opinion of the court as follows:

Two points have been made in this cause.

1. That a corporation, composed of citizens of

one state, may sue a citizen of another state, in the federal courts.

2. That a right to sue in those courts is conferred on this bank by the law which incorporates it.

The last point will be first considered.

The judicial power of the United States, as defined in the constitution, is dependent, 1st. On the nature of the case; and, 2d. On the character of the parties.

By the judicial act, the jurisdiction of the circuit courts is extended to cases where the constitutional right to plead and be impleaded, in the courts of the union, depends on the character of the parties; but where that right depends on the nature of the case, the circuit courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same state, claiming lands under grants from different states.

Unless, then, jurisdiction over this cause has been given to the circuit court by some other than the judicial act, the bank of the United States had not a right to sue in that court, upon the principle that the case arises under a law of the United States.

The plaintiffs contend that the incorporating act confers this jurisdiction.

That act creates the corporation, gives it a capacity to make contracts and to acquire property, and enables it "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever."

This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to

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appear, as a corporation, in any court which would, by law, have cognisance of the cause, if brought by individuals. If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums however small they may be.

But the 9th article of the 7th section of the act furnishes a conclusive argument against the construction for which the plaintiffs contend. That section subjects the president and directors, in their individual capacity, to the suit of any person aggrieved by their putting into circulation more notes than is permitted by law, and expressly authorizes the bringing of that action in the federal or state courts.

This evinces the opinion of congress, that the right to sue does not imply a right to sue in the courts of the union, unless it be expressed. This idea is strengthened also by the law respecting patent rights. That law expressly recognises the right of the patentee to sue in the circuit courts of the United States.

The court, then, is of opinion, that no right is conferred on the bank, by the act of incorporation, to sue in the federal courts.

2. The other point is one of much more difficulty.

The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, "to controversies between citizens of different states," both parties must be citizens, to come within the description.

That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation

be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union.

The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.

A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states. Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substan-

tially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.

Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction. Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favour of the right of incorporated aliens, or citizens of a different state from the defendant, to sue in the national courts. It is by a course of acute, metaphysical and abstruse reasoning, which has been most ably employed on this occasion, that this opinion is shaken.

As our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character. It is defined as a mere creature of the law, invisible, intangible, and incorporeal. Yet, when we examine the subject further, we find that corporations have been included within terms of description appropriated to real persons.

The statute of Henry VIII. concerning bridges and highways, enacts, that bridges and highways shall be made and repaired by the "*inhabitants* of the city, shire, or riding," and that the justices shall have power to tax every "*inhabitant* of such city," &c. and that the collectors may "distrain every such *inhabitant* as shall be taxed and refuse payment thereof, in his lands, goods and chattels."

Under this statute those have been construed inhabitants who hold lands within the city where the

bridge to be repaired lies, although they reside elsewhere.

Lord Coke says, "every corporation and body politic residing in any county, riding, city, or town corporate, or having lands or tenements in any shire, *quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of this statute."

The tax is not imposed on the person, whether he be a member of the corporation or not, who may happen to reside on the lands; but is imposed on the corporation itself, and, consequently, this ideal existence is considered as an inhabitant, when the general spirit and purpose of the law requires it.

In the case of *The King* v. *Gardner*, reported by *Cowper*, a corporation was decided, by the court of king's bench, to come within the description of "occupiers or inhabitants." In that case the poor rates, to which the lands of the corporation were declared to be liable, were not assessed to the actual occupant, for there was none, but to the corporation. And the principle established by the case appears to be, that the poor rates, on vacant ground belonging to a corporation, may be assessed to the corporation, as being inhabitants or occupiers of that ground. In this case Lord Mansfield notices and overrules an inconsiderate *dictum* of Justice Yates, that a corporation could not be an inhabitant or occupier.

These opinions are not precisely in point; but they serve to show that, for the general purposes and objects of a law, this invisible, incorporeal creature of the law may be considered as having corporeal qualities.

It is true that as far as these cases go they serve to show that the corporation itself, in its incorporeal character, may be considered as an inhabitant or an occupier; and the argument from them would be more strong in favour of considering the corporation

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itself as endowed for this special purpose with the character of a citizen, than to consider the character of the individuals who compose it as a subject which the court can inspect, when they use the name of the corporation, for the purpose of asserting their corporate rights. Still the cases show that this technical definition of a corporation does not uniformly circumscribe its capacities, but that courts for legitimate purposes will contemplate it more substantially.

There is a case, however, reported in 12 Mod. which is thought precisely in point. The corporation of London brought a suit against Wood, by their corporate name, in the mayor's court. The suit was brought by the mayor and commonalty, and was tried before the mayor and aldermen. The judgment rendered in this cause was brought before the court of king's bench and reversed, because the court was deprived of its jurisdiction by the character of the individuals who were members of the corporation.

In that case the objection, that a corporation was an invisible, intangible thing, a mere incorporeal legal entity, in which the characters of the individuals who composed it were completely merged, was urged and was considered. The judges unanimously declared that they could look beyond the corporate name, and notice the character of the individual. In the opinions, which were delivered *seriatim*, several cases are put which serve to illustrate the principle, and fortify the decision.

The case of *The Mayor and Commonalty* v. *Wood*, is the stronger, because it is on the point of jurisdiction. It appears to the court to be a full authority for the case now under consideration. It seems not possible to distinguish them from each other.

If, then, the congress of the United States had, in terms, enacted that incorporated aliens might sue

a citizen, or that the incorporated citizens of one state might sue a citizen of another state, in the federal courts, by its corporate name, this court would not have felt itself justified in declaring that such a law transcended the constitution.

The controversy is substantially between aliens, suing by a corporate name, and a citizen, or between citizens of one state, suing by a corporate name, and those of another state. When these are said to be substantially the parties to the controversy, the court does not mean to liken it to the case of a trustee. A trustee is a real person capable of being a citizen or an alien, who has the whole legal estate in himself. At law, he is the real proprietor, and he represents himself, and sues in his own right. But in this case the corporate name represents persons who are members of the corporation.

If the constitution would authorize congress to give the courts of the union jurisdiction in this case, in consequence of the character of the members of the corporation, then the judicial act ought to be construed to give it. For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name.

That corporations composed of citizens are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the registering act. It never could be intended that an American registered vessel, abandoned to an insurance company composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation.

The court feels itself authorized by the case in 12 *Mod.* on a question of jurisdiction, to look to

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the character of the individuals who compose the corporation, and they think that the precedents of this court, though they were not decisions on argument, ought not to be absolutely disregarded.

If a corporation may sue in the courts of the union, the court is of opinion that the averment in this case is sufficient.

Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.

Judgment reversed; plea in abatement overruled, and cause remanded.

Judge LIVINGSTON, having an interest in the question, gave no opinion.

MATTHEWS *v.* ZANE'S LESSEE.

The lands included within the *Zanesville district* by the act of the 3d March, 1803, could not, after that date, be sold at the Marietta land-office.

ERROR to the supreme court of the state of Ohio for the county of Muskingum, in an action of ejectment brought by Zane's Lessee against Matthews, in which both parties claimed title under the laws of the United States. The question of jurisdiction in this case was settled at last term. (*Ante*, *vol.* 4. *p.* 382.)

The remaining question was, whether the plaintiff in error, or the defendant, had the title to the west fraction of section No. 15. in township No. 12. in range No. 13. in the state of Ohio.

This question arose upon a special verdict, which stated the following facts.

On the 7th of February, 1804, the office of re-

ceiver of public moneys at *Marietta* then being vacant, Matthews applied to the register of the land-office at *Marietta*, for the purchase of that fraction, who received the application, and gave Matthews a certificate thereof.

On the 26th of March, 1804, a register and receiver were appointed for the *Zaneville* district, and also a receiver of public moneys for the Marietta district, who commenced the duties of his office on the first of May, in that year.

After the 12th of May, in the same year, Matthews purchased the land at the *Marietta* land-office, by making such payments, and receiving such certificates, as are prescribed by law.

On the 21st of May, 1804, the land-office was first opened at *Zaneville*, and the sales of land commenced therein.

On the 17th of the same May, a schedule was forwarded from the surveyor-general, purporting to be a complete list of the lands lying within the *Zaneville* district, which had been before sold at the Marietta land-office, and in which the land in controversy was not included.

Subsequent to the passage of the law for the erection of the *Zaneville* district, and prior to the time when the office of receiver of public moneys for the Marietta district became vacant, two entries were made in the Marietta land-office, of land lying within the *Zaneville* district, which entries and sales were acknowledged as good and valid by the government of the United States, who considered Matthews's entry as void, and the secretary of the treasury has directed his purchase-money to be repaid to him. The two tracts, the sales of which were confirmed by the government of the United States, were in the surveyor-general's schedule returned as sold at Marietta; but the land in controversy was not included in that schedule, because

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the register of the land-office at Marietta had not made his return, as by law directed, to the surveyor-general, who had no guide by which to make out the schedule, but the returns of the register. The officers of the Zaneville land-office were directed by the secretary of the treasury to receive the schedule as the *only evidence* of what land had been sold at Marietta.

On the 26th of May, 1804, *Zane* purchased, at the *Zaneville* land-office the land in controversy, by making such payments, and receiving such a certificate, as by law are prescribed, at which time Matthews produced his certificate from the register of the *Marietta* land-office, and gave notice of his having purchased the same land.

Zane's purchase was confirmed by the secretary of the treasury.

P. B. Key, for the plaintiff in error, contended,

1. That the purchase made by Matthews was legal and valid. And,

2. That the defendant in error was not entitled to recover.

That this subject may be distinctly understood, it may be necessary concisely to state the land system of the United States.

In 1785, the old congress passed an ordinance for the survey and sale of public lands in the north-western territory. Seven ranges of townships were laid off, and sales made at *New-York*, to a considerable extent. The Indian wars that soon followed, closed the sales. But after General Wayne's treaty at Greeneville, in 1795, congress took up the subject again, and in May, 1796, passed an act for appointing a surveyor-general, and directing surveys and sales. *Vol.* 3. *p.* 293. These surveys could not be completed till the end of the year 1799. The act

of the 10th of May, 1800, *vol. 5. p.* 174. established the present system, by which four land-offices were to be opened, viz. at *Cincinnati*, *Chilicothe*, *Marietta*, and *Steubenville*. That at *Marietta* was for the lands lying east of the *sixteenth* range of townships, south of the military lands, and south of a line drawn due west from the north-west corner of the first township of the second range to the military lands. A register of the land-office, and a receiver of public moneys, was to be appointed for each of the offices. A person wishing to purchase any of the lands was to pay to the treasurer of the United States, or the receiver of public moneys, one twentieth part of the purchase-money besides certain fees, and take his receipt therefor, which he was to carry to the register, who was to enter his application in a book, stating the date of the application, the date of the receipt, and the number of the section, or half section, township and range applied for. No lands were to be sold at less than two dollars an acre, one fourth, including the one twentieth, in forty days, one fourth in two years, one fourth in three years, and the residue in four years, with interest. A discount of 8 *per cent. per annum* was to be allowed for prompt payment. Upon payment of the whole purchase-money a patent was to be issued by the president of the United States.

Thus stood the land system, and the mode of purchasing and acquiring title until congress, desirous of bringing more lands into the market, passed an act on the 3*d of March*, 1803, *vol.* 6. *p.* 291. by the 6th section of which, a new district was created called the *Zaneville* district, which covered part of the lands in Marietta district, and, among others, the lands in controversy, and certain lands in the military tract which had not been surveyed. This act did not prescribe the time when the land-office should be opened at *Zaneville*, nor when the officers should be appointed.

The first question which presents itself under this law is, did it prevent a continuance of sales at Ma-

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rietta, of the lands which had been surveyed in that district, and now included in the *Zaneville* district?

We contend it did not.

All these laws are to be construed together as forming one system. The two great principles of the system are,

Settlement of the western frontier, and *revenue* to be derived from the sales of the lands.

The importance of the first, and the policy of settling the western frontier, are too obvious for illustration. It has been an object of anxiety at all times from the first organization of the union.

As an object of revenue it has been the incessant subject of attention, and of primary importance. The proceeds of the sales were in 1790 assigned to the sinking fund. With a view to facilitate sales, the lands have been divided into sections and half sections. Discounts, and abatement of interest, have been allowed on prompt payment. The sale of the western lands, therefore, being a leading object of national policy, it is to be presumed that they were not to cease unless by positive law.

There is nothing in the act creating the *Zaneville* district to prevent a sale at *Marietta*, before the *Zaneville* office should be opened.

There is nothing repugnant to such a construction. Both acts may so far stand together, and be consistent with each other and with the general policy of the United States.

The 5th and 6th sections of the act of 1803, taken together, show that a previous survey was to be made of the unappropriated military lands which were to form a part of the *Zaneville* district, before the sales could commence there.

The 4th section of the act of 1800, gave full powers to the *Marietta* land-office to sell all the lands within that district.

This power exists until destroyed, and cannot be repealed by doubtful implication against the great national policy and the scope of the laws. It was well understood that the Zaneville land-office could not be opened until a survey should be made. Officers were to be appointed; and none were appointed until a year after, because they could not act until the surveys should be completed, and the lands ready for sale.

This shows what construction the executive gave to the law. The surveyor-general also returned a list of sales made at Marietta, up to the 17th of May, 1804. All the sales upon that list have been confirmed by the treasury.

In the course of the year 1803 a survey was made, and congress, by the act of the 26*th of March*, 1804, *vol. 7. p.* 106. § 12. opened the Zaneville land-office on the 21st of May, 1804, and directed the sales to commence there on that day.

Is it a reasonable construction to contend that 700,000 acres should be locked up from market for a whole year, when every act of the government demonstrated their anxiety to make sales.

The act of 1803 described limits within which an office was erected for future sales, but the opening of that office and proceeding to sell was to be settled by a future law. This was done, and the office directed to go into operation on the 21st of May, 1804. Until that period the office at Marietta might proceed to sell.

This construction derives weight from an analogous case, a case also of revenue.

Suppose a district, for the collection of duties, di-

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vided, and a new port of entry established, and a collector to be appointed, would this put a stop to the entry and collection at the first port until the second office was open for business?

If Matthews's purchase had been inserted in the surveyor-general's schedule, it would have been confirmed by the treasury for the same reason that the two other similar sales were confirmed.

The reason why it was not upon that schedule was the neglect of the register. Shall the neglect or omission of his duty by an officer of the United States prejudice the claim of an innocent purchaser?

The schedule of the surveyor-general was not the only admissible evidence of sales at the Marietta office. There was no statute, nor any principle of law, which made it such. It was a matter *in pais*, which might be proved by any kind of legal evidence. The register's certificate which Matthews produced at the Zaneville office at the time and place of sale to Zane, was the very best evidence which could then be required; and it ought to have been respected. Zane purchased with a full knowledge of Matthews's title.

Harper, contra, contended that the authority to sell at *Zaneville* was inconsistent with the authority to sell at Marietta; and that consequently the latter was revoked by the former. When the act of March 3, 1803, directed that these lands should be offered for sale at *Zaneville*, they could no longer be sold elsewhere. The act provides for the appointment of officers to sell. Congress had only to create the office. The president was to appoint the officers, under the general authority given to him by the constitution. If the president did not appoint, that did not prevent the effect of the act. The president cannot dispense with the law, nor suspend its operation.

The act of the 26th of March, 1804, *vol. 7. p.* 106.

directs positively that the lands shall be offered for sale at Zaneville on the third Monday of May.

No quarter sections or fractions of sections of this land could be sold elsewhere. This act of the 26th of March, 1804, first gave the power to sell the fractions of sections separately. It could not be done at Marietta until the 14th of May, 1804, yet Matthews's purchase was on the 12th, so that even if this land could have been sold at Marietta at all, it could not, on the 12th of May, have been sold separately from a section; nor could have been sold until it had first been offered at public auction.

P. B. Key, in reply.

The purchase of this fraction was *with a whole section*, and therefore the fact does not support the argument on the other side.

The only questions are whether the authority to sell these lands at the *Marietta* office ceased before the *Zaneville* office was opened; and whether the neglect of the register to make a return of this sale to the surveyor-general shall prejudice the claim of the plaintiff in error.

February 16.

MARSHALL, Ch. J. stated the opinion of the court to be that the decision of the court below was correct; that the erection of the Zaneville district suspended the power of sale in the Marietta district.

Judgment affirmed.

HODGSON *v.* THE MARINE INSURANCE COMPANY OF ALEXANDRIA.

A general policy, insuring every person having an interest in the thing insured, and containing no warranty that the property is neutral, covers belligerent as well as neutral property.

In an action of covenant on a policy, it is no defence to say that the premium has not been paid, but is enjoined by a court of chancery.

A misrepresentation, not averred to be material, is no bar to an action on a policy. A misrepresentation, to have that effect, must be material to the *risk of the voyage.*

It is not necessary, in an action of covenant on a policy, that the declaration should aver that the plaintiff had abandoned to the underwriters.

ERROR to the circuit court of the district of Columbia, in an action of covenant upon a sealed policy, whereby the Marine Insurance Company of Alexandria, in consideration of seventeen and a half *per cent.* premium paid by the plaintiff Hodgson, for "*George F. Straas and others, of Richmond,*" covenanted with the plaintiff for the said "*George F. Straas and others, of Richmond,* as well in his own name as for and in the name and names of all and every other person and persons to whom the same did, might, or should appertain, in part or in all," to insure *eight thousand dollars* on the brig Hope "a prize vessel," lost or not lost, at and from her last port of lading in St. Domingo to a port of discharge in the Chesapeake. The vessel was valued in the policy at *ten thousand dollars.* The declaration averred the vessel to be of that value, and that in prosecution of the voyage insured she was seized by certain British vessels and carried into Jamaica, where she was libelled, condemned and sold, whereby she was totally lost. In one count of the declaration the vessel was averred to be the property of George F. Straas and Jeremiah Leeds, of Richmond, in the other it was averred to be the property of Leeds alone.

The defendants, after *oyer*, pleaded eight pleas. Upon the three first there were issues in fact.

The 4th plea, in substance, was, that the vessel, at the time of the capture and sale was the property of the enemies of Great Britain, and as such was captured, libelled, condemned and sold. That Richmond was the capital town of the state of Virginia, a *neutral* state. That Straas and Leeds were of Richmond, and citizens of Virginia, and were

known to be so to the parties to the policy at the time of insurance. That the insurance was made by the contracting parties upon the property of American citizens in which no belligerent subject or citizen was interested; and that at the time of insurance, capture, condemnation and sale of the vessel, there was open war between France and Great Britain.

To this plea there was a demurrer, and the following causes were stated:

1. Because the plea alleges that the vessel was the property of the enemies of Great Britain, but does not show in particular who were the owners thereof.

2. Because the plea is double in this, 1st. That it tenders an issue upon the fact of its being enemies' property; 2d. That it was condemned as such; 3d. That the insurance was made upon the property of American citizens.

3. Because it alleges that the insurance was made upon the property of American citizens, which is matter of law, and not of fact.

4. Because, as the policy contained no warranty of neutrality, it is wholly immaterial whether the property was neutral or belligerent.

5. Because the plea is no answer to the plaintiff's declaration.

6. Because it admits Straas and Leeds to be owners of the property insured, and to be American citizens, and it does not state any other person or persons to be the owners thereof.

7. Because the defendants were estopped by the policy from alleging that the insurance was made upon the proptery of American citizens.

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The 5th plea, in substance, was, that it has always been, and is the rule and practice of the defendants, never to make an insurance upon a vessel beyond her reasonable and just value according to the representation and description given of her, especially as to her age, tonnage and equipment, which rule and practice were well known to the contracting parties at the time of the contract, at which time the plaintiff proposed to the defendants that the value of the vessel should be agreed in the policy to be ten thousand dollars; and that at the time of executing the policy, the plaintiff, to induce the defendants to execute it, thereby insuring to the value of 8,000 dollars upon the vessel, represented that she was "*about* 250 *tons burthen*," "and *from six to seven years old.*" That the defendants, *in consequence of that representation*, and placing full faith and credit therein, executed the policy. That the representation was untrue in this, that the vessel was not of two hundred and fifty tons burthen, but *less than one hundred and sixty-five tons* burthen, and was not from six to seven years old at the time of the representation, but much older, viz. more than eight and a half years old. That the vessel was not of the value of eight thousand dollars, but of the value of 3,000 dollars only. That the misrepresentation respecting the age and tonnage of the vessel induced the defendants to execute the policy, whereby the value was agreed to be ten thousand dollars, and whereby insurance was made to the amount of 8,000 thousand dollars; "*and so the said deed is void as to them; and this they are ready to verify.*"

To this plea also there was a demurrer, and the following causes were stated:

1. Because the plea does not aver the misrepresentation to be material.

2. Because it is not alleged to have been fraudulently made.

3. Because the matter of the plea is not sufficient to annul or make void the policy.

4. Because the misrepresentation alleged is not of a definite fact; but that the vessel was of *about* 250 tons burthen, &c.

5. Because the plea is double in this, that it puts in issue the custom of the defendants, the representation touching the vessel, the age, the tonnage and the value of the vessel.

6. Because the defendants are estopped by the policy from averring that the vessel was of less value than 10,000 dollars.

The 6th plea was like the 5th, except that the averment respecting the rule and practice of the defendants was omitted, and that it contained an averment that the difference between the true and the represented age and tonnage of the vessel "*was material in regard to the contract of insurance*," in the policy set forth; and so the policy was void as to them.

To this plea the plaintiff, protesting that the vessel was seaworthy, and that he did not knowingly and fraudulently state any misrepresentation, and admitting that the vessel was of less than 165 tons burthen, and was eight and a half years old, replied, that the difference between the true and the represented age and tonnage of the vessel, was not material *in regard to* the seaworthiness of the vessel, and her ability to perform the voyage insured, and did not increase the probability of loss by means of any of the risks insured against, but was altogether immaterial in regard to those risks.

The rejoinder of the defendants set forth their rule and practice as stated in the 5th plea; and averred that the misrepresentation induced and deceived the defendants into the agreement as to the value of the vessel, and as to the sum insured, and that the sum insured was more than double the value of the vessel, and so the defendants say that the difference between the true and the represented age and tonnage of the vessel was material.

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To this rejoinder the plaintiff demurred, and stated causes of demurrer nearly like those to the 5th plea.

The 7th plea was, in substance, that the vessel was in part owned by one Alexander Burot, a French citizen, and an enemy of Great Britain, and that this fact was not disclosed to the defendants at the time of executing the policy.

To this plea there was a general demurrer.

The 8th plea was, in substance, that the plaintiff had not paid the premium, but had obtained a perpetual injunction from the court of chancery in Virginia, against the defendants, to prevent the recovery thereof.

To this plea also there was a general demurrer.

The judgment of the court below was in favour of the defendants on the demurrer to the 6th plea, and in favour of the plaintiff upon all the other demurrers.

Swann, for the plaintiff in error.

It is a sufficient answer to the 4th plea, that the policy is general; it contains no warranty of neutrality, and therefore covers belligerent as well as neutral property. 1 *N. Y. T. Rep.* 230. 238. 243. 2 *Emerig.* 460. *Doug.* 16. *Marsh.* 286.

The objections to the 5th plea are,

1. That no misrepresentation touching the subject of a sealed contract is sufficient, in a court of law, to set it aside.

The insurance cases against incorporated companies in England show that an equitable defence may be made in that country under the statutes. All other cases upon insurances are cases of simple contract.

This question then depends upon the general principles of the common law. By that law a misrepresentation touching the subject of a sealed contract was not pleadable against that contract.

It is true that any fraud in the execution of an instrument which will authorize the plea of *non est factum*, may be relied on at law. 1 *Burr.* 391. So you may show that the consideration of a deed is unlawful, as in the cases of usury, gaming, simony, &c. But this plea shows no fraud, nor unlawful consideration. It relies merely upon a mistake which goes only to a part of the subject matter of the contract.

2. The misrepresentation set forth in this plea would not be sufficient to vacate the policy, even if it were a simple contract. The misrepresentation must relate to the risk, and be material as it regards the risk. All the cases speak a uniform language upon this subject. *Marsh.* 334, 335. *Park*, 197. 204, 205. 1 *N. Y. T. Rep.* 237, 238. 245.

If the representation must be material in regard to the *risk*, the plea is bad in substance; because it does not show any facts which would increase the risk, nor aver the representation to be material to the risk.

3. As the misrepresentation relates to the value of the vessel, and not to the risk of the voyage, the defendants are estopped from alleging that the vessel was worth less than the value agreed upon in the policy.

4. In a valued policy the underwriter waives all inquiry into any fact or circumstance that relates to the value of the thing insured: and the extent or amount of value in such a policy is altogether immaterial. *Park*, 1. 109.

The 6th plea concludes by saying that the repre-

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sentation was material in regard to the *contract of insurance.*

This averment is difficult to be understood. It might mean material as it regarded the amount insured, or material as it regarded the risk. If issue had been taken upon this averment, the jury might have decided that the representation was material as it regarded the amount insured; and upon that ground the cause might have been lost. If the plaintiff had demurred to it, it might have been an admission that it was material to the risk. If the averment had been that it was material as to the amount insured, we should have demurred; if it had been that it was material to the risk, we should have taken issue.

In this uncertainty it was necessary for the plaintiff to reply specially, tendering an issue as to the materiality of the representation in regard to the risk of the voyage. This issue the defendants refused to join, and have thereby explained their averment to be that the representation was material, not to the risk, but to the amount insured. In this point of view it is bad not only for the reasons alleged against the 5th plea, but because it neither shows nor avers the representation to be material in regard to the risk.

No falsehood or misrepresentation, not increasing the risk, is material. No misrepresentation touching the ability of the vessel to perform the voyage can be material if she is *seaworthy.* The law does not notice grades of seaworthiness; and with regard to this point her age and tonnage were perfectly immaterial: and it was equally immaterial as to the value, because the value was conclusively fixed in the policy.

E. J. Lee and *C. Lee*, contra, contended, 1st. That the expression "*of Richmond*" implied a warranty that the property was neutral, and the condemnation was conclusive evidence of a breach of that

warranty. 2dly. That the declaration was bad because it contained no averment of an offer to abandon; and, 3dly. That the misrepresentation, as stated, amounts to a fraud in law, and that fraud will vacate every kind of instrument; and that in all cases of insurance any misrepresentation material *to the contract* is fatal.

It is because it is a *valued* policy, that the misrepresentation as to the age and tonnage became material to the contract. It was a misrepresentation of those facts upon which a judgment was to be formed of the value of the vessel. The defendants never would have agreed to fix that value, unless they had believed the representation of the plaintiff as to those facts. The misrepresentation induced the defendants to make a contract which they would not otherwise have made. It is unnecessary that the plaintiff should have known that he was misrepresenting the facts.

He undertook to represent the facts, and by so doing must take the risk of their truth, and the consequences of their falsehood.

The *materiality* was a question for the jury. Whenever the question of law is involved with the fact, the court may leave the whole to the jury.

The plea is not double. A misrepresentation may be in a variety of particulars necessary for the formation of a correct judgment as to the value.

The defendants are not estopped by their deed from alleging facts which show the mistake, or misrepresentation upon which the instrument was predicated; because if the deed be void the estoppel cannot exist.

If the goods of an enemy be insured as the goods of an ally, the policy is void. The only question on this point is, whether the vessel was insured as an American vessel.

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The payment of the premium is for ever enjoined, and nothing can be more unjust than to compel the defendants to pay the loss.

The following authorities were cited by the counsel of the defendants. 1 *Rob.* 11. 13. 1 *Burr.* 397. *Shep. Touch.* 58. 59. *Chitty on Bills*, 8, 9. 3 *Bro. Parl. Cas.* 525. *Smith's Rep.* 289. 2 *P. Wms.* 154. 157. 220. 287. *Marsh.* 339, 340. 348. *Doug.* 260. *Marsh.* 199. 201. 586. 2 *Wils.* 347. 1 *Fonb.* 230. 5 *Com. Dig.* tit. *Pleader*, 2 *W.* 18. 3 *T. R.* 438. *Hayne* v. *Maltby.* 2 *W. Bl.* 1152. 5 *Co.* 129. *Gilb. Ev.* 163. 2 *Vent.* 107. *Bull.* 173. 1 *Mod.* 477. 1 *Wooddeson*, 207. 3 *Burr.* 1918. *Carter* v. *Boehm. Pa k*, 182. 1 *N. Y. T. Rep.* 229. *Barnewall* v. *Church. Doug.* 260, 261, 262. *M'Dowell* v. *Frazier.* 1 *W. Bl.* 593. *Carter* v. *Boehm. Millar*, 57. *Park*, 209. *Marsh.* 208, 209. 350. *Stewart* v. *Dunlop.* 2 *East*, 452. *Williamson* v. *Allison.* 4 *East*, 590. *Haywood* v. *Rodgers. Marsh.* 540. *Le Cras* v. *Hughes.* 3 *Cranch*, 281. *M'Ferran* v. *Taylor & Massie.* 1 *Ves* 213. 4 *Dall.* 250. *Doug.* 96. 2 *Wils.* 352. *Collins* v. *Blantern.* 1 *Vent.* 121. *Doug.* 30. 2 *Wils.* 8 *Long* v. *Jackson. Skin.* 327.

Jones, in reply, was directed by the court to confine his observations to the 5th and 6th pleas.

No fraud or covin is charged in either of those pleas; the doctrines, therefore, respecting a sealed instrument being vacated by fraud, do not apply. The case depends upon the principles of the common law applicable to contracts under seal.

The 5th and 6th pleas are in substance the same; and if the 5th be bad, as the court below decided, the 6th must be bad for the same reasons.

There is no case in which a sealed instrument has been set aside on the grounds alleged in the plea. If the facts would not maintain an action of deceit, they will not avoid a contract under seal. They cannot even be given in evidence. It must be a

matter that goes to the *whole* contract, and shows it to be void *ab initio*. It must be an allegation of *fraud*, or of *illegal consideration*.

The case of *Hayne* v. *Maltby*, 3 *T. R.* 438. is the only one cited which bears upon the present. But there the contract was void *ab initio*, and the case was decided upon the principle of fraud. It is immaterial what the facts of the case were, or how slight the evidence of fraud was. It is the principle only which is to be considered.

In an action at law upon a sealed contract you cannot go into the question of consideration, but to show it *fraudulent* or *illegal*. 2 *Cro.* 4. *Chandler* v. *Lopus*. 1 *Com. Dig.* 184. 2 *East*, 446.

February 24.

CUSHING, J. (*Marshall, Ch. J. not sitting in the cause*) delivered the opinion of the court,* as follows:

The insurance in this case being general, as well for the parties named as "for all and every other person or persons to whom the vessel did or might appertain," and containing no warranty of neutrality, belligerent as well as American property was covered by it. Some of the parties being described as *of Richmond*, does not necessarily imply that they all resided there; but if they did, mere residence would not make them citizens; and even then, an express warranty was necessary, if it had been designed to run only a neutral risk. This is an answer to the 7th as well as to the 4th plea; because there can be no undue concealment as to the parties interested, where the terms of the policy are so broad as to preclude the necessity, either of disclosing their names, or of inserting them in the instrument.

* Present, *Cushing*, *Washington*, *Livingston* and *Johnson*, justices.

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The eighth plea is also bad. The defendants acknowledge, under seal, to have received a consideration of 17 1-2 *per cent.* for the insurance they made, which it appears was secured by a note, the amount of which was to be deducted from the sum to be paid for a loss, if any happened. On the face of the instrument, then, a valid consideration, if that be necessary, is stated, and if the note be never paid it cannot vacate the contract, or be relied on as a defence to an action on it. This court knows not why a court of equity has been applied to for an injunction. Its proceedings, therefore, can have no influence on the present suit, for notwithstanding its interposition in the way mentioned in this plea, the defendants cannot be deprived of the right they have reserved of deducting the amount of premium from whatever sum they may have to pay for the loss that has occurred.

Without deciding whether a material misrepresentation, not fraudulent, can be pleaded in avoidance of a sealed instrument, the court thinks there is no fact disclosed by either the fifth or sixth plea, which could vacate an insurance were it only a simple contract. In no part of the 5th plea is the misrepresentation alleged to be material. It is only to be inferred that it had some influence (but to what degree does not appear) in prevailing on the defendants to agree to so high a valuation. It will hardly, however, be insisted, that every over-valuation, however inconsiderable, or however innocently produced, will annul a contract of this nature. It would seem more reasonable, to let mistakes of this kind (if they are to have any operation at all) regulate the extent of recovery, and not deprive the party of his whole indemnity: for if an extravagant valuation be made, an underwriter cannot reasonably ask to be relieved beyond the excess complained of. The allegation that the vessel was worth, when insured, only 3,000 dollars, is also very unimportant, it being nowhere stated that the plaintiff represented her to be worth more, but only proposed that her value in the policy should be agreed

at ten thousand dollars. Now although she might not in fact have been worth this sum, it is impossible for the court to say that this difference was produced entirely by the mistake which was made in her age and tonnage. This would be to say that a difference of a year or two in the age, and of fifty or sixty tons in the burden of a vessel, must, in all cases, have the same effect on her value; a conclusion which, on investigation, would be found very incorrect. Nor, if it appeared on trial that her actual worth were no more than 3,000 dollars, would it necessarily avoid the contract, or restrict the damages to that sum; for she may, notwithstanding, have fairly cost her owners the whole amount of her valuation; who, in that case, would have honestly represented her as worth 10,000 dollars.

But a more fatal objection to this plea is, that the misrepresentation relied on is not stated to have been material to the risk of the voyage; and yet the only cases in which policies have been avoided for innocent misrepresentations are those in which the matter disclosed or concealed has affected the risk so as to render it different from the one understood at the time, and on which the premium was calculated.

Most of the remarks on the 5th apply also to the 6th plea: for although it be here alleged that the misrepresentation was material "in regard to the contract of insurance," it should have been stated in what particular, that it might appear whether the *risk run* were at all affected by it.

An objection is made to the declaration, but not much relied on, that no abandonment is averred to have been made. In covenant such averment cannot be necessary. If it be proved on the trial, it will be sufficient.

The judgment of the circuit court on the 4th, 5th, 7th and 8th pleas must be affirmed with costs; and its judgment in favour of the defendants on the

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6th plea reversed; and judgment on that plea be also rendered for the plaintiff.

JOHNSON, J. The difficulties in this case arise partly from the pleadings, and partly from the case presented by the pleadings.

This policy, having been effected by a corporation under its corporate seal, has been considered as imposing an obligation on the insured to bring *covenant* instead of *assumpsit*, as is usual on such contracts.

Thus the defendants have been obliged to plead specially; and the cause comes up on demurrer, which, of course, admits the case as made up on the pleadings.

Whether there is sufficient matter well pleaded why the plaintiff ought not to recover? is therefore the question before us.

I am of opinion that there is. I cannot for a moment suffer the sealing of the policy, or the form of the action, to impose any restriction upon the latitude of defence applicable to the contract of insurance. Such a doctrine would be fatal to every incorporated insurance company. I therefore maintain, that in the action of covenant on a policy of insurance, every defence may be taken advantage of, in pleading, that could be introduced, in evidence, before a jury. It is an exceedingly inconvenient form of action for trying the merits of questions arising out of this species of contract, and I feel disposed, if possible, to diminish the inevitable difficulties, and the intricate and voluminous pleadings, which must grow out of this form of action, and to admit every facility which the rules of pleading will possibly sanction.

There are eight pleas filed to the present action. On the three first there are issues in fact, and the court below has given judgment on the remaining

five. I am disposed to concur in their decisions on each of these several pleas, although, perhaps, on some of them, for reasons not altogether the same with those by which they were influenced; but I shall confine my observations solely to the sixth plea, as that disposes of the case finally, if decided for the defendants, and has been the principal subject of the argument before this court.

The substance of this plea is, that the plaintiff misrepresented the age and tonnage of the vessel, whereby the defendants were induced to insure to a higher amount than they otherwise should; and concludes with averring, that the difference between the true age and tonnage of the vessel, and the represented age and tonnage, *was material in regard to the contract of insurance.*

The plaintiff replies that this misrepresentation was immaterial in regard to the *seaworthiness* of the vessel, *her ability to perform the voyage*, and the *other risks* insured against.

To me it appears that the plea presents the true turning point of the case, and that the replication draws towards questions very different from that which ought to control our decisions.

It is not on the doctrine of *seaworthiness* that a misrepresentation is held to vitiate the policy, because the insured is always held to guaranty the sufficiency of his vessel to perform the voyage insured. Nor is it an evident and necessary *increase* of the risk; but it is presenting such false lights to the insurer, as induce him to enter into a contract materially different from that which he supposes he is entering into. It is a rule of law introduced to protect underwriters from those innumerable frauds which are practised upon them in a contract which must of necessity be regulated almost wholly by the information derived from the insured.

I do not lay so much stress upon the misrepre-

sentation with regard to the age of the vessel; for that appertains much to her seaworthiness; but with regard to her size the misrepresentation was so enormous as leaves no doubt upon my mind that had the case been submitted to a jury, the court would have been bound to charge them in favour of the defendants. It had in its nature an immediate tendency to entrap the defendants into one of the most common and most successful snares laid for the unwary underwriter. To make it the interest of the insured rather to sink than to save his vessel. It can very well be conceived that an underwriter may be induced to insure a certain sum upon a certain vessel for a very moderate premium, when no premium would induce him to insure double that amount upon the same bottom. I am aware of a very considerable difficulty arising out of this case, viz. how we are to estimate the degree of misrepresentation with regard to tonnage which shall vitiate a policy? but it is a difficulty arising out of the *mode* in which we are drawn into a decision on the case, rather than out of the case itself.

If this question had been brought before a jury, the difficulty would have vanished; but shall the party lose the benefit of this defence because the pleadings have assumed such a shape as to force the court into a decision upon the point without a jury? I am of opinion that he ought not, if it can be avoided; an extreme case may be supposed in which the misrepresentation may be very inconsiderable, as of a single ton for instance; but, on the other hand, we may suppose an extreme case of a misrepresentation to the highest possible number of tons burden, say 1,000 tons; will it be said that, in the latter case, the misrepresentation would not avoid the policy?

From these considerations it seems to result that the court is driven to the necessity of deciding this case upon its intrinsic merits, and reserving its opinion upon successive cases as they shall occur. This necessity is forced upon us by the alternative either to decide that no misrepresentation, however gross,

of the size of the vessel will avoid a policy, or that any misrepresentation, however minute, will have that effect. It is to be hoped, in the mean time, that some statutory provision may be made, which will relieve the court from a similar embarrassment.

Judgment reversed.

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AT the last term Gideon Olmstead, in behalf of himself and Artimus White, Aquilla Rumsdale, and David Clark, moved the court for a *mandamus** to be directed to the honourable Richard Peters, judge of the district court of the United States for the Pennsylvania district, commanding him to order and direct an attachment or other proper process to issue to enforce obedience to the sentence of the said district court in a civil cause of admiralty and maritime jurisdiction, in which the said Gideon Olmstead and others were libellants, and Elizabeth Serjeant and Esther Waters were respondents. This motion was made upon a suggestion, supported by affidavit, that a copy of the sentence had been served upon the respondents, which they refused to obey; and that application had been made to the judge for an attachment, which he had refused to grant; whereupon a *mandamus nisi* was granted returnable to this term; when the judge made the following return:

The legislature of a state cannot annul the judgments, nor determine the jurisdiction, of the courts of the United States

The court of appeals in prize causes, erected by the continental congress, had power to revise and correct the sentences of the state courts of admiralty.

Although the *claims* of a state may be ultimately affected by the decision of a cause, yet if the state be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction.

* On Saturday, March 5th, 1808, upon the affidavit of Olmstead, a rule was granted that Judge Peters should show cause by the next Saturday, why a mandamus should not issue. On Saturday, March 12th, a letter was received by one of the counsel for Olmstead, from Judge Peters, acknowledging service of the rule; and stating that an act of the legislature of Pennsylvania had commanded the governor of that state to call out an armed force to prevent the execution of any process to enforce the performance of the sentence. That such being the state of things he should not direct process to issue unless he should be so ordered by this court; whereupon a *mandamus nisi* was granted, returnable at the next term.

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"To the honourable the supreme court of the United States,

"The subscriber, judge of the district court of the United States in and for the district of Pennsylvania, in obedience to the *mandamus* issued by order of the supreme court in the case of Gideon Olmstead and others, libellants, against the surviving executrixes of the late David Rittenhouse, Esq. and to the said district judge directed, begs leave to return,

"That the proceedings of the district court in the above cause, which are herewith transmitted, and respectfully submitted, will show the grounds of the judgment by the said court rendered. Every opportunity, through the whole course of these proceedings, was given to the parties to litigate the claim, or discuss questions, either on the merits or jurisdiction. Nor was any step taken, without due and timely notice.

"The answer of the respondents will show their objections to the claim of the libellants. This answer refers to an act of assembly of the state of Pennsylvania, passed the 26th day of February, 1801, which was not produced or brought under the legal notice of the court.

"No application for execution of the decree was made until within twelve or eighteen months past; nor has it been, till more recently, much pressed.

"By the suggestion filed by the respondents, their objections to the execution of the decree will appear. They have made an act of assembly of the state of Pennsylvania a part of their suggestion; and thus, for the first time, during the pendency of the suit, brought this act under the judicial notice of the court. It is entitled "An act relating to the claim of this commonwealth against Elizabeth Serjeant and Esther Waters, surviving executrixes of David Rittenhouse, Esq. deceased, passed

April the second, 1803:" and to this act I pray leave to refer.

"This act, or any of its allegations, has no influence on my opinion. Let this opinion be erroneous or correct, a proceeding, in some of its parts, indecorous, and, in others, unjustifiable, can have no operation in rectifying supposed errors, or convincing my judgment. But from prudential, more than other motives, I deemed it best to avoid embroiling the government of the United States and that of Pennsylvania (if the latter government should choose so to do) on a question which has rested on my single opinion, so far as it is touched by my decree: and, under the influence of this sentiment, I have withheld the process required. If this be not considered a legal cause, it must be deemed a candid acknowledgment that I do not invariably obey a rigorous dictate of duty, or follow an inflexibly strict construction of law.

"I entertained a hope that a legislature succeeding that by which the act before mentioned was passed, would, under a more temperate view of the subject, have repealed it; and enabled and directed the executive of the state, or some other authority, to put this case in a legal train of investigation: so that the final judgment and decree of the superior tribunal of the United States might have been, in a proper course, obtained; and thereby any erroneous opinion, or decree, given or made by me, might have been rectified (if any opinion or decree should have been found illegal or erroneous) in a manner more becoming the real dignity of a state, more suitable to the situation of those who execute the duties of a branch of the government of the United States, and more consistent with the good order and peace of the community. This hope was cherished by the proceedings of the legislature of Pennsylvania, in other cases wherein the state claimed interests. This expectation has been disappointed. There being no other legal mode of obtaining the decision of

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the superior tribunal of the United States, (the only jurisdiction by which the judgments of inferior courts of the United States can be finally rectified or judicially annulled,) I have thought it proper, and, under all circumstances, fully justifiable, to obtain that decision, by placing the case under the cognisance of your honourable court, in its present form.

"On the merits and justice of the claim of the libellants, I have no doubt; but remain of the same opinion I have mentioned in my decree.

"As to the jurisdiction; I have never conceived that the allegations on this point, contained in the act of assembly last mentioned, had legal foundation. It is well known to your honourable court, that third persons claiming interests *in pais*, cannot, by such claims, constitute themselves, or be judicially considered, parties in suits pending in the names of others. Nor does there now exist any legal mode of interpleading, or compelling states to become parties to suits in the courts of the United States. Yet if your honourable court shall be of opinion that the objections to jurisdiction are relevant, I shall, agreeably to my duty, continue to withhold any farther proceeding. But if, on the other hand, a peremptory direction to execute the decree shall be the consequence of your deliberations, having now the whole case before you, there can be no order or direction, which it is in my legal obligation to obey, to which (impelled by a sense of justice, however I may regret the circumstance, as it respects the parties respondents, or other consequences which may flow from it) I shall more cheerfully submit.

"RICHARD PETERS.

"*Philadelphia*, *July* 18*th*, 1808."

The facts as they appear in the record and documents referred to by the judge, in the above answer, were in substance as follows.

Gideon Olmstead, Artimus White, Aquilla

Rumsdale and David Clark, citizens and inhabitants of the state of Connecticut, were, during the revolutionary war, captured by the British and carried to Jamaica, where they were put on board the sloop Active to assist as mariners in navigating the sloop to New-York, then in possession of the British, with a cargo of supplies for the fleets and armies of Great Britain. During which voyage, about the 6th of September, 1778, they rose upon the master and crew of the sloop, confined them to the cabin, took the command of the vessel and steered for Egg Harbour, in the state of New-Jersey. On the 8th of September, when in sight of that harbour they were pursued, and forcibly taken possession of by Captain Thomas Houston, commander of the armed brig *Convention*, belonging to the state of Pennsylvania, and, on the 15th of September, brought into the port of Philadelphia; when Houston libelled the vessel as prize to the *Convention*. A claim was interposed by Captain James Josiah, master of the American privateer *Le Gerard*, who claimed a share of the capture as having been in sight and by agreement cruising in concert with the *Convention*. A claim was also interposed by Olmstead and others for the whole vessel and cargo, as being their exclusive prize. The state court of admiralty, however, adjudged them only one fourth part, and decreed the residue to be divided between the state and the owners of the privateer, and the officers and crews of the *Convention* and the *Le Gerard*. From this sentence Olmstead and others appealed to the court of commissioners of appeals in prize causes for the United States of America, where, on the 15th of December, 1778, the sentence of the state court was reversed, and it was ordered and adjudged that the vessel and cargo should be condemned as lawful prize for the use of the appellants, Olmstead and others, and that the marshal should sell the same, and pay the net proceeds to them or their agent or attorney. Upon receipt of a copy of this sentence, the court of admiralty made the following order:

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"Thomas Houston, Esq. et al., appellees, ads. "Gideon Olmstead, Artimus White, Aquilla Rumsdale, and David Clark, appellants, claimants of the sloop Active and her cargo. } "In the court of Admiralty, for the State of Pennsylvania.

"The court, taking into consideration the decree of the court of appeals in this cause, reversing the judgment or sentence of this court in the same cause, and further decreeing a condemnation of the sloop Active, her tackle, apparel, furniture and cargo, as prize, &c. and that process of this court should issue for the sale of the said sloop, her cargo, &c. and for the distribution of the moneys arising from the said sale after deducting costs, to the claimants above named, their agent or attorney; after mature consideration are of opinion, that although the court of appeals have full authority to alter or set aside the decree of a judge of this court, yet that the finding of the jury in the cause does establish the facts in the cause without re-examination or appeal. And therefore the verdict of the jury still standing, and being in full force, this court cannot issue any process, or proceed in any manner whatsoever contradictory to the finding of the said jury. And therefore doth now decree, order and adjudge, that the marshal of this court be commanded to sell at public vendue at the highest price that can be gotten for the same, the said sloop or vessel called the Active, her tackle, apparel and furniture, and the goods, wares and merchandises laden and found on board her at the time of her capture, &c. and after deducting the costs and charges of the trial, condemnation and sale thereof, out of the moneys arising from the said sale, that he bring the residue thereof into court, there to remain ready to abide the further order of this court therein.

"*George Ross.*

"December 28th, 1778."

The finding of the jury, alluded to in the above order, was in these words:

"In the cause wherein Thomas Houston is libellant, and Olmstead and others first claimants, and James Josiah second claimant, we find as follows:

1-4th of the net proceeds of the sloop Active and her cargo to the first claimants.

3-4ths of the net proceeds of said sloop and her cargo to the libellant and to the second claimants, as per agreement between them.

"Nov. 4th, 1778."

The warrant which Judge Ross directed to be issued to the marshal to make sale of the vessel and cargo, in pursuance of the above order, and which was accordingly issued on the 28th of December, 1778, after reciting the proceedings in this court, and in the court of appeals, proceeds as follows: "This court therefore taking into consideration the premises, and being of opinion that consistent with the laws of this state it cannot carry into execution the whole of the said sentence of the honourable the court of appeals aforesaid: yet willing, so far as the said sentence appears legal, to carry it into effect, and to prevent, as far as possible, any injuries or losses which the parties to this cause, or either of them, may be liable to by the vessel and cargo continuing in their present situation, do therefore hereby command you forthwith to sell," &c. "and, after deducting the costs and charges, to bring the residue of the said moneys *into court* ready to abide the further order of this court." This warrant was made returnable at a court of admiralty to be holden at the judge's chambers, on the 7th of January, 1779.

Copies of the above order and warrant being produced, on the same 28th of December, 1778, before the court of appeals, it was moved, on the

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part of the appellants, Olmstead and others, that process might issue to the marshal of the admiralty of Pennsylvania, commanding him to execute the decree of the court of appeals; and after argument the case was postponed for further argument until Monday, 4th of January, 1779, at *5 o'clock P. M.* On which day at 8 *o'clock A. M.* the court of appeals being again convened at the pressing instance and request of the claimants Olmstead and others, it was moved and suggested by their advocates that notwithstanding the decree of the court of appeals, which had been transmitted to the court of admiralty, the judge of that court had appointed the hour of *nine* on that morning for the marshal to pay into court the money arising from the sale of the sloop Active and cargo; which suggestion was supported by the oath of the registrar of the admiralty; whereupon it was prayed that an injunction might issue from the court of appeals directed to the marshal of the court of admiralty, commanding him to keep the money in his hands until the further order of the court of appeals; which injunction was accordingly granted, reciting the sentence of the court of admiralty and its reversal, and the decree by the court of appeals; the refusal of the judge of the court of admiralty to cause that decree to be executed; and the motion to the court of appeals for a writ to the marshal commanding him to execute the same; the continuance of that motion to the 4th of January, 1779, at 5 o'clock P. M. and the appointment of the hour of 9 o'clock A. M. of the same day, by the special order of the judge of the court of admiralty, for the marshal to pay the money into that court, whereby the effect of the writ prayed for, if the court should grant it, would be eluded.

This injunction was served upon the marshal before he paid the money into the court of admiralty; but he disregarded it, and paid the money over to the judge, who gave a receipt for it.

"Whereupon the court (of appeals) declared and ordered to be entered on record, that as the judge and marshal of the court of admiralty of the state

of Pennsylvania had absolutely and respectively refused obedience to the decree and writ regularly made in and issued from this court, to which they and each of them were and was bound to pay obedience, this court being unwilling to enter upon any proceedings for contempt, lest consequences might ensue at this juncture dangerous to the public peace of the United States, will not proceed further in this affair, *nor hear any appeal*, until the authority of this court be so settled as to give full efficacy to their decrees and process.

" Ordered that the register do prepare a state of the proceedings had upon the decree of this court, in the case of the sloop Active, in order that the commissioners may lay the same before congress."

Upon the writ issued by the judge commanding the marshal to sell the vessel and cargo, and bring the proceeds into court to abide its further order, the marshal, on the 4th of January, 1779, returned, that in obedience to that writ he had deposited in the court of admiralty 47,981*l.* 2*s.* 5*d.* Pennsylvania currency, on account of the *cargo* of the prize sloop Active; but that the sloop remained yet unsold.

The money was loaned to the United States, and the loan-office certificates brought into court and deposited in the hands of the judge, who, on the 1st of May, 1779, delivered to David Rittenhouse, treasurer of the state of Pennsylvania, fifty of the certificates, amounting to 11,496*l.* 9*s.* 9*d.* " being the share or dividend of the state in right of the brig Convention in and out of the prize sloop Active, according to the verdict of the jury on the trial of the said sloop Active in the admiralty court of that state ;" at the same time taking a bond of indemnity from Mr. Rittenhouse, by the name of " David Rittenhouse, of the city of Philadelphia, gent." the condition of which was that " Whereas the said George Ross hath this day paid to the said David Rittenhouse, *treasurer of the state of Pennsylvania, for the use of the said state*, the sum," &c. Now " if he the said David Rittenhouse shall make repay-

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ment and restitution of the said sum of 11,496*l.* 9*s.* 9*d.* unto the said George Ross, his executors or administrators, in case he the said George Ross shall hereafter by due course of law be compelled to pay the same according to the decree of the court of appeals in the case of the said sloop Active; and if he the said David Rittenhouse shall and do in all things well and truly save harmless and indemnified at all times hereafter the said George Ross, his heirs, executors and administrators, and his and their lands and tenements, goods and chattels of and from all damages, actions and demands which may arise or happen, for or on account of his having paid the money aforesaid, then the above obligation to be void, or else to be and remain in full force and virtue."

The certificates were afterwards funded in the name of David Rittenhouse, and among his papers was found a list of the old loan-office certificates, and of the new funded stock, at the foot of which was written, in the hand-writing of Mr. Rittenhouse, the following memorandum:

"Noté. The above certificates will be the property of the state of Pennsylvania, when the state releases me from the bond I gave in 1778, to indemnify George Ross, Esq. judge of the admiralty, for paying the fifty original certificates into the state treasury as the state's share of the prize."

In the year 1801, the legislature of Pennsylvania passed an act requiring the treasurer to call upon the executrixes of Mr. Rittenhouse for the certificates of stock, and to give them a bond of indemnity, but they refused to deliver them up, being advised that they would not be safe in so doing.

On the 4th of January, 1803, the judge of the district court for the district of Pennsylvania, pronounced the following final decree in the cause:

"This is the long depending case of the sloop Active and cargo. It comes before me by libel

filed against the executors of the late Mr. Rittenhouse, who received from George Ross, Esq. then judge of the state court of admiralty, the sums mentioned in the libel, which were invested in the certificates of stock as stated therein. Mr. Rittenhouse, on receiving these certificates, which were proceeds of the sales of the said sloop and cargo, gave a bond of indemnity to Mr. Ross, which is now offered, when payment of these proceeds is made, to be delivered up. The suit is instituted for the purpose of carrying into effect a decree of the court of appeals established under the old confederation, a copy whereof appears among the exhibits. In the answer it is alleged that the moneys were received for the state of Pennsylvania. In the replication this is denied. In a memorandum made by Mr. Rittenhouse, at the foot of the account exhibited, it appears that he intended to pay over these proceeds to the state, when indemnified. No such payment ever has been made, and the certificates and moneys are yet in the hands of the respondents.

"It appears to me that Mr. Rittenhouse considered himself, as I conceive he was, a stakeholder, liable to pay over the deposit to those lawfully entitled thereto. His executors conceive themselves in the same predicament, and have declined paying over the certificates and interest. No counsel have appeared, and requested to be heard on the part of the respondents, and I am left to judge from the libel, answer, replication and exhibits which contain the state of the facts. If I should be thought mistaken in the opinion I form on the subject, there is time and opportunity to appeal to a superior tribunal.

"I throw out of the case all circumstances not immediately within my present view of the duty I have to perform. I have nothing to do with the original question, that has been decided by the court of appeals; nor does it appear to me essential for me to determine with what intentions Mr. Rittenhouse received the certificates. The fact of the

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certificates and interest being now in the hands of the respondents is granted by them in their answer. It has been determined by the supreme court of the United States that this court has power to effectuate the decrees of the late court of appeals in prize causes, and this court has, on several occasions, practised agreeably to that decision. There is no doubt in my mind (the authorities in the books being clear on this point) that the process and jurisdiction of this court will reach and extend over the proceeds of all ships, goods and articles taken as lawful prize, found within the district, and legally proceeded against therein. These proceeds are under the same legal disposition, and subject to the same responsibility, under whatever shape they may appear, as the original *thing* from which they were produced. It is conceded that the certificates and moneys in question are proceeds of the sloop and cargo in the libel mentioned. These were decreed to the libellants by the judgment of the late court of appeals. I am, therefore, of opinion, and accordingly decree, and finally adjudge and determine, that the certificates be transferred and delivered, and the interest moneys paid over by the respondents to the libellants, in execution of the judgment and decree of the court of appeals, as stated in the proceedings in this cause, with costs. I make it, however, a condition that the bond of indemnity be cancelled or delivered to the respondents, on their compliance with this decree.

"*Richard Peters.*

"January 14, 1803."

No further proceedings in this cause were had in the district court until the 18th of May, 1807, when, on motion of Mr. Lewis, in behalf of the libellants, Olmstead and others, the respondents were ruled to show cause by the next Friday why the decree pronounced in this cause should not be carried into execution; and the bond of indemnity referred to in the decree was filed in court ready to be delivered

up, or cancelled, on compliance with the decree by the respondents.

On the 29th of May, 1807, to which day the rule had been enlarged, the respondents appeared and suggested to the court,

That after making the decree in this case, to wit, on the second day of April, A. D. 1803, the general assembly of the commonwealth of Pennsylvania passed an act, which was then approved by the governor of the said commonwealth, in the following words: "An act relating to the claim of this commonwealth against Elizabeth Serjeant and Esther Waters, surviving executrixes of David Rittenhouse, Esq. deceased."

Whereas, by an act of congress for the erecting of tribunals competent to determine the propriety of captures during the late war between Great Britain and her then colonies, passed the 25th day of November, one thousand seven hundred and seventy-five, it is enacted, in the fourth section thereof as follows, viz. "That it be and is hereby recommended to the several legislatures in the United Colonies, as soon as possible to erect courts of justice, or give jurisdiction to the courts now in being for the purpose of determining concerning the captures to be made as aforesaid, and to provide that all trials in such case be had by a jury, under such qualifications as to the respective legislatures shall seem expedient;" and in the sixth section thereof as follows, viz. "That in all cases an appeal shall be allowed to the congress, or to such person or persons as they shall appoint for the trial of appeals."

And whereas, by an act of the general assembly of Pennsylvania, passed the 9th of September, 1778, entitled, "An act for establishing a court of admiralty," appeals were allowed from the said court in all cases, unless from the determination or finding of the facts by a jury, which was under the provisions of that law to be without re-examination

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or appeal: And whereas, by a resolution of congress of the 15th of January, 1780, it was, among other things, declared, "That trials in the court of appeals shall be according to the law of nations, and not by jury."

And whereas the British sloop *Active*, having been captured as prize on the high seas, in the month of September, 1778, and brought into the port of Philadelphia, and there libelled in the court of admiralty of the said state, held before George Ross, Esq. the then judge of the said court, on the 18th day of the said month of September: And whereas the libellants then and there against the said sloop Active, Gideon Urmstead or Olmstead, Artimus White, Aquilla Rumsdale and David Clark, who claimed the whole vessel and cargo as their exclusive prize; Thomas Houston, master of the brig *Convention*, a vessel of war belonging to Pennsylvania, who claimed a moiety of the said prize for the state of Pennsylvania, himself, and his crew; and James Josiah, master of the sloop *Gerard*, private vessel of war, who claimed one fourth part of the said prize for himself, his owners and crew: And whereas all the facts respecting the said capture being submitted to the said court of admiralty, and a jury then and there returned, empannelled and sworn, a general verdict was brought in by the said jury, which was confirmed by the court, whereby Gideon Olmstead, Artimus White, Aquilla Rumsdale and David Clark, became entitled to one fourth of the said prize; Thomas Houston, for himself and crew, became entitled to another fourth; the state of Pennsylvania, as owner of the vessel of war the *Convention*, to another fourth; and James Josiah, himself and owners and crew of the sloop *Gerard*, became entitled to the remaining one fourth part of the said prize: And whereas the said Gideon Olmstead, Artimus White, Aquilla Rumsdale and David Clark, being dissatisfied with the verdict and sentence aforesaid, did appeal from the said court of admiralty of Pennsylvania, unto the court or committee of appeals appointed as aforesaid under the

authority of congress, notwithstanding the recommendation of congress aforesaid, of the 25th day of November, 1775, for the appointment of courts of admiralty in each of the then United Colonies, did expressly provide that all trials respecting capture should be had by a jury, and under such qualifications as to the respective legislatures should seem expedient, and notwithstanding the court of appeals did decide not by a jury, but by the usage of nations, and notwithstanding the law for establishing the court of admiralty of Pennsylvania did expressly take away the right of appeal where the facts were found and determined by the intervention of a jury, and notwithstanding the state was authorized at the time to make such qualification or provision, taking away the right of appeal in jury cases, by virtue of the recommendation of congress aforesaid, which allowed and recommended the said courts of admiralty to be established with a jury under such qualifications as to the respective legislatures should seem expedient: And whereas the said court of appeals of the United States, on the 15th day of December, 1778, did reverse the sentence of the court of admiralty aforesaid, and did decree the whole of the said prize to the appellants: And whereas the judge of the court of admiralty, to wit, George Ross aforesaid, did refuse obedience to the decree of reversal, and did direct Matthew Clarkson, then marshal of the said court, to pay part of the proceeds of the said prize, to the amount of 11,496*l.* 9*s.* 9*d.* Pennsylvania currency, for the use of the state of Pennsylvania, into the treasury of the state of Pennsylvania, whereof David Rittenhouse was then treasurer, taking a bond of indemnity from the said David Rittenhouse, as treasurer as aforesaid, to save him the said George Ross, his executors, administrators, &c. harmless from the consequences of such payment, which bond is dated the 1st day of May, 1779: And whereas the said George Ross dying, suit was brought against his executors in the court of common pleas of Lancaster county, by and on the part of the appellants before named for the money whereunto they pre-

tended title by virtue of the decree aforesaid of the court of appeals reversing the sentence of the court of admiralty, whereof the said George Ross had been judge: And whereas it does not appear that the said David Rittenhouse had any notice or information, or was in any legal way apprized of, or made a party to, the said suit in the court of common pleas of Lancaster county, either in his personal capacity, or as treasurer of the state of Pennsylvania, so that judgment was obtained by default against the executors of the said George Ross without any knowledge of the said David Rittenhouse, or his being able to take any measures on behalf of himself or the state of Pennsylvania to prevent the same: And whereas, in consequence of the judgment so obtained in the said court of common pleas of Lancaster county, against the executors of the said George Ross, the said executors brought suit against the said David Rittenhouse, which, in the year one thousand, seven hundred and ninety-two, in the term of April of the same year, was heard and determined in the supreme court of Pennsylvania, (on a case stated for the opinion of the court, after verdict taken for the plaintiff, subject to that opinion,) by Thomas M'Kean, chief justice, and others, the judges of the said court, who, among other things thereunto relating, did decree and determine that the reversal, as before mentioned, had and made in the court of appeals, was contrary to the provisions of the act of congress recommending the establishment of courts of admiralty, and of the general assembly of the state of Pennsylvania, in their act for the establishment of the said court, and was extrajudicial, erroneous and void, and that the court of common pleas of the county of Lancaster was incompetent to carry into effect the decree of the court of appeals, and that the judge of the court of admiralty aforesaid, George Ross, was not liable to an action in a court of law for distributing money according to his decree, as judge of the said court: And whereas at the second session of the third congress of the United States, held at the city of Philadelphia, in the month of

December, one thousand, seven hundred and ninety-three, it was proposed, as an amendment to the constitution of the United States, that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state, which, having been adopted by the requisite number of states, as appears by the communication to congress of the then president, John Adams, to this purpose, of January the eighth, one thousand, seven hundred and ninety-eight, did become a part of the constitution of the United States: And whereas, on the twenty-seventh day of May, one thousand, eight hundred and two, the said Gideon Olmstead, Artimus White, Aquilla Rumsdale and David Clark, by their attorney, William Lewis, Esq. did file a bill in the district court of the United States, at Philadelphia, for the district of Pennsylvania, before Richard Peters, judge of the said court, against Elizabeth Serjeant and Esther Waters, surviving executrixes of David Rittenhouse aforesaid, deceased, for the recovery of the moneys, with interest, so paid into the hands of the said David Rittenhouse by Matthew Clarkson, marshal of the admiralty court aforesaid, as proceeds of the prize, the brig Active so captured as aforesaid, and by the said David Rittenhouse and his executrixes aforesaid formerly and still retained: And whereas, in the answer of the said Elizabeth Serjeant and Esther Waters to the bill aforesaid, it sufficiently and substantially appears, that the said money was originally received by the said David Rittenhouse, and was by him detained, as treasurer of the commonwealth of Pennsylvania, which commonwealth was, and still is, interested in, and a claimant of, the same, under the decree of the said George Ross, as judge of the court of admiralty in manner as herein before stated: And whereas the said Richard Peters, judge of the said district court, on the bill, answer and replication so filed by and between the said Gideon Olmstead, Artimus White, Aquilla Rumsdale and David Clark, of the one part, against Eli-

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zabeth Serjeant and Esther Waters, executrixes as aforesaid, did, on the fourteenth day of January, one thousand, eight hundred and three, proceed to decree as follows, viz. "This is the long depending case of the sloop Active and cargo," &c. All which legal proceedings herein before stated, will more fully and at large appear on reference to the records of the respective courts wherein the same were had: Therefore it hath become necessary for the general assembly of Pennsylvania, as guardians of the rights and interests of this commonwealth, and to prevent any future infringements on the same, to declare, that the jurisdiction entertained by the court or committee of appeals, over the decree of George Ross, as judge of the court of admiralty of Pennsylvania, in the suit where the claimants of the brig Active, as prize, were the libellants, as herein before stated, was illegally usurped and exercised, in contradiction to the just rights of Pennsylvania, and the proper jurisdiction of the court of admiralty established as aforesaid, under the authority of this state, and that the reversal of the decree of the said George Ross, in that suit, was null and void; that the jurisdiction entertained by Richard Peters, judge of the district court aforesaid, in the suit of Gideon Olmstead, Artimus White, Aquilla Rumsdale and David Clark against Elizabeth Serjeant and Esther Waters, surviving executrixes of David Rittenhouse, deceased, was illegally usurped and exercised; that the rights of this commonwealth, as a claimant, and as the party substantially interested, in the said suit, though apparent on the face of the proceedings, were unfairly passed over and set aside; that the said David Rittenhouse was not and ought not to have been considered in the light of a mere stakeholder, but as the treasurer and agent of this commonwealth, and that the jurisdiction and decree of the said Richard Peters hereon were entertained and made in manifest opposition to, and violation of, the last amendment of the constitution of the United States herein before stated, and ought not to be supported or obeyed. Therefore,

Sect. 1. *Be it enacted by the senate and house of representatives of the commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same*, that the governor of this commonwealth be authorized, and he is hereby authorized and required, to direct the attorney-general of this commonwealth to apply without delay to Elizabeth Serjeant and Esther Waters, executrixes as aforesaid, and require them forthwith to pay into the treasury of this commonwealth, the moneys by them admitted to have been received in respect of the premises, in their answer to the bill so as aforesaid filed against them, in the district court of Pennsylvania, before Richard Peters, judge of the said court, without regard to the decree of the said Richard Peters herein, and in default thereof by the said Elizabeth Serjeant and Esther Waters, to direct the said attorney-general to bring suit in the name of the commonwealth, in the proper court of this commonwealth, against the said Elizabeth Serjeant and Esther Waters, for the moneys aforesaid, and proceed as speedily as the course of legal proceedings will permit, to enforce the recovery and payment thereof into the treasury of this commonwealth.

Sect. 2. *And be it further enacted by the authority aforesaid*, that the governor of this commonwealth be authorized and required, and he is hereby authorized and required, to protect the just rights of the state, in respect of the premises, by any further means and measures that he may deem necessary for the purpose, and also to protect the persons and properties of the said Elizabeth Serjeant and Esther Waters from any process whatever issued out of any federal court in consequence of their obedience to the requisition, so as aforesaid directed to be made to them by the attorney-general of this commonwealth, and in the name of this commonwealth to give to the said Elizabeth Serjeant and Esther Waters a sufficient instrument of indemnification, in case of their payment of the moneys aforesaid, in compliance with this act, without suit brought

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against them on the part of this commonwealth for the recovery of the same.

Simon Snyder, speaker of the house of representatives.

Robert Whitehill, speaker of the senate.

Approved, April 2, 1803.

Thomas M'Kean, governor of the commonwealth of Pennsylvania.

That they, the defendants, being required by proper authority to pay into the treasury of the said commonwealth the moneys admitted to have been received as executrixes of David Rittenhouse, Esq. in manner aforesaid, did, on the 19th day of July, 1803, transfer to the treasurer of the commonwealth the certificates of stock abovementioned, and on the 29th of July, 1803, pay into the treasury of the commonwealth the moneys by them received as aforesaid, in obedience to the said act of the general assembly, and to the requisition made under it.

The defendants respectfully further suggest, that the said certificates and money were received by their said testator, as the treasurer and officer of the said commonwealth, as appears by the bond of the said David Rittenhouse, given on the receipt thereof, filed in this court by the libellants, the 22d of May inst.; and that the same came to their hands, as his representatives, after such receipt: And, it being expressly insisted by the said act of the general assembly, that the said commonwealth had and has a right to the said certificates and money, and these defendants having, as aforesaid, obeyed the requisition of the said act, these defendants suggest that the said decree of this honourable court ought not to be executed, nor any process issued thereupon against them.

The defendants respectfully further suggest that the said decree of this honourable court was pronounced, so far as respects the claims, rights and interests of the said commonwealth of Pennsylvania, *ex parte*, and without jurisdiction.

John Serjeant, attorney for defendants.

After this suggestion, nothing appears to have been done until the application to this court at February term, 1808, when the motion was made for a rule on the judge to show cause why a *mandamus* should not issue commanding him to issue an *attachment*, or other proper process, to enforce obedience to his sentence, as before mentioned.

At this term, *Rodney*, (*attorney-general*,) *Lewis*, and *F. S. Key*, of counsel for *Olmstead and others*, submitted the return of the *mandamus* to the consideration of the court without argument.

February 20.

MARSHALL, Ch. J. delivered the opinion of the court as follows:

With great attention, and with serious concern, the court has considered the return made by the judge for the district of Pennsylvania to the *mandamus* directing him to execute the sentence pronounced by him in the case of *Gideon Olmstead and others* v. *Rittenhouse's Executrixes*, or to show cause for not so doing. The cause shown is an act of the legislature of Pennsylvania, passed subsequent to the rendition of his sentence. This act authorizes and requires the governor to demand, for the use of the state of Pennsylvania, the money which had been decreed to Gideon Olmstead and others; and which was in the hands of the executrixes of David Rittenhouse; and, in default of payment, to direct the attorney-general to institute a suit for the recovery thereof. This act further authorizes and requires the governor to use any further means he

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may think necessary for the protection of what it denominates "the just rights of the state," and also to protect the persons and properties of the said executrixes of David Rittenhouse, deceased, against any process whatever, issued out of any federal court in consequence of their obedience to the requisition of the said act.

If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves.

The act in question does not, in terms, assert the universal right of the state to interpose in every case whatever; but assigns, as a motive for its interposition in this particular case, that the sentence, the execution of which it prohibits, was rendered in a cause over which the federal courts have no jurisdiction.

If the ultimate right to determine the jurisdiction of the courts of the union is placed by the constitution in the several state legislatures, then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the district court of Pennsylvania, over the case in which that jurisdiction was exercised, ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.

In the early part of the war between the United States and Great Britain, Gideon Olmstead and

others, citizens of Connecticut, who say they had been carried to Jamaica as prisoners, were employed as part of the crew of the sloop Active, bound from Jamaica to New-York, and laden with a cargo for the use of the British army in that place. On the voyage they seized the vessel, confined the captain, and sailed for Egg Harbour. In sight of that place, the Active was captured by the *Convention*, an armed ship belonging to the state of Pennsylvania, brought into port, libelled and condemned as prize to the captors. From this sentence Gideon Olmstead and others, who claimed the vessel and cargo, appealed to the court of appeals established by congress, by which tribunal the sentence of condemnation was reversed, the Active and her cargo condemned as prize to the claimants, and process was directed to issue out of the court of admiralty, commanding the marshal of that court to sell the said vessel and cargo, and to pay the net proceeds to the claimants.

The mandate of the appellate court was produced in the inferior court, the judge of which admitted the general jurisdiction of the court established by congress, as an appellate court, but denied its power to control the verdict of a jury which had been rendered in favour of the captors, the officers and crew of the *Convention;* and therefore refused obedience to the mandate: but directed the marshal to make the sale, and, after deducting charges, to bring the residue of the money into court, subject to its future order.

The claimants then applied to the judges of appeals, for an injunction to prohibit the marshal from paying the money, arising from the sales, into the court of admiralty; which was awarded, and served upon him: in contempt of which, on the 4th of January, 1778, he paid the money to the judge, who acknowledged the receipt thereof at the foot of the marshal's return.

On the 1st of May, 1799, George Ross, the judge

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of the court of admiralty, delivered to David Rittenhouse, who was then treasurer of the state of Pennsylvania, the sum of £1,496*l.* 9*s.* 9*d.* in loan-office certificates; which was the proportion of the prize money to which that state would have been entitled, had the sentence of the court of admiralty remained in force. On the same day, David Rittenhouse executed a bond of indemnity to George Ross, in which, after reciting that the money was paid to him for the use of the state of Pennsylvania, he binds himself to repay the same, should the said George Ross be thereafter compelled, by due course of law, to pay that sum according to the decree of the court of appeals.

These loan-office certificates were in the name of Matthew Clarkson, who was marshal of the court of admiralty, and were dated the 6th of November, 1778. Indents were issued on them to David Rittenhouse, and the whole principal and interest were afterwards funded by him, in his own name, under the act of congress making provision for the debt of the United States.

Among the papers of David Rittenhouse was a memorandum, made by himself at the foot of a list of the certificates mentioned above, in these words: "Note. The above certificates will be the property of the state of Pennsylvania, when the state releases me from the bond I gave in 1778, to indemnify George Ross, Esq. judge of the admiralty, for paying the 50 original certificates into the treasury, as the state's share of the prize."

The state did not release David Rittenhouse from the bond mentioned in this memorandum. These certificates remained in the private possession of David Rittenhouse, who drew the interest on them during his life, and after his death they remained in possession of his representatives; against whom the libel in this case was filed, for the purpose of carrying into execution the decree of the court of appeals.

While this suit was depending, the state of Pennsylvania forbore to assert its title, and, in January, 1803, the court decreed in favour of the libellants; soon after which, the legislature passed the act which has been stated.

It is contended that the federal courts were deprived of jurisdiction, in this cause, by that amendment of the constitution which exempts states from being sued in those courts by individuals. This amendment declares, "that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The right of a state to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case, the suit was not instituted against the state or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; but it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their

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looking into the suggestion, and examining the validity of the title.

If the suggestion in this case be examined, it is deemed perfectly clear that no title whatever to the certificates in question was vested in the state of Pennsylvania.

By the highest judicial authority of the nation it has been long since decided, that the court of appeals erected by congress had full authority to revise and correct the sentences of the courts of admiralty of the several states, in prize causes. That question, therefore, is at rest. Consequently, the decision of the court of appeals in this case annulled the sentence of the court of admiralty, and extinguished the interest of the state of Pennsylvania in the *Active* and her cargo, which was acquired by that sentence. The full right to that property was immediately vested in the claimants, who might rightfully pursue it, into whosesoever hands it might come. These certificates, in the hands, first, of Matthew Clarkson, the marshal, and afterwards of George Ross, the judge, of the court of admiralty, were the absolute property of the claimants. Nor did they change their character on coming into the possession of David Rittenhouse.

Although Mr. Rittenhouse was treasurer of the state of Pennsylvania, and the bond of indemnity which he executed states the money to have been paid to him for the use of the state of Pennsylvania, it is apparent that he held them in his own right, until he should be completely indemnified by the state. The evidence to this point is conclusive. The original certificates do not appear to have been deposited in the state treasury, to have been designated in any manner as the property of the state, or to have been delivered over to the successor of David Rittenhouse. They remained in his possession. The indents, issued upon them for interest, were drawn by David Rittenhouse, and preserved with the original certificates. When funded as

part of the debt of the United States, they were funded by David Rittenhouse, and the interest was drawn by him. The note made by himself at the foot of the list, which he preserved, as explanatory of the whole transaction, demonstrates that he held the certificates as security against the bond he had executed to George Ross; and that bond was obligatory, not on the state of Pennsylvania, but on David Rittenhouse, in his private capacity.

These circumstances demonstrate, beyond the possibility of doubt, that the property, which represented the Active and her cargo, was in possession, not of the state of Pennsylvania, but of David Rittenhouse as an individual; after whose death it passed, like other property, to his representatives.

Since, then, the state of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the district court was pronounced, and since the suit was neither commenced nor prosecuted against that state, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited; and, consequently, the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.

It will be readily conceived that the order which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. *A peremptory mandamus must be awarded.*

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To constitute a consideration it is not necessary that a benefit should accrue to the promisor. It is sufficient that something valuable flows from the promisee, and that the promise is the inducement to the transaction.

A blank endorsement upon a blank piece of paper with intent to give a person credit, is in effect a letter of credit. And if a promissory note be afterwards written on the paper, the endorsor cannot object that the note was written after the endorsement.

The English statute of frauds requires that the *agreement* should be in writing; the statute of Virginia requires only the *promise* to be in writing.

Before resort can be had to the endorsor of a promissory note in Virginia, the maker must be sued, if solvent; but

ERROR to the circuit court for the district of Columbia, sitting at Alexandria, to reverse a judgment in an action of *assumpsit*, brought by Patton, as endorsee of a promissory note, against Violett, the endorsor. The note was made by *Brooke*, payable, in 30 days, at the bank of Alexandria, to the order of Violett, and by him endorsed to Patton.

The declaration had two counts. The first was upon the endorsement, and stated the making of the note by Brooke, for value received; the assignment by endorsement to Patton, (but did not state that the assignment was for value received,) by means whereof, and of the statute of Virginia, Patton had a right to demand and receive the money from Brooke; the demand of payment from Brooke; his refusal and insolvency at the time of demand; and notice thereof to Violett, whereby he became liable, and in consideration thereof promised to pay, &c.

The other count was for money had and received.

At the trial of the general issue, the defendant below took two bills of exceptions.

The first was to the following opinions and instructions of the court to the jury, viz.

That if the jury should be satisfied by the evidence that the defendant endorsed the note with intent to give a credit for the amount thereof to Brooke with the plaintiff, and that the body of the note was filled up by the plaintiff before it was signed by Brooke, and that the plaintiff, upon the faith of the note so drawn and endorsed, gave credit to Brooke to the amount thereof; the circumstance

of such endorsement being made before the body of the note was filled up by the plaintiff and signed by Brooke, is no bar to the plaintiff's recovery in this action; although the jury should be satisfied that no other value was received by the defendant for his endorsement than the credit thus given by the plaintiff to Brooke. And further, that the endorsement by the defendant with the intent aforesaid, if proved, authorized Brooke to make the note to the plaintiff in the form and manner in which it appears upon the face of it to be made; and that the circumstance that the body of the note was in the hand-writing of the plaintiff, was wholly immaterial to the present issue.

his insolvency renders a suit against him unnecessary. It is a question to be left to the jury whether a suit against the maker would have produced the money.

The second bill of exceptions stated, that the defendant prayed the court to instruct the jury that if they should be satisfied by the evidence that Brooke, at the time the note became payable, or at any time previous to the commencement of this action, had property sufficient to pay the debt claimed by the plaintiff, and that both he and the plaintiff lived in the town of Alexandria at the time the note became due, and that the plaintiff brought no suit against Brooke to recover the amount of the note, but suffered him to leave the district of Columbia, without suing him: or if the jury should be satisfied that the plaintiff and Brooke have, since the note became due, both lived in the county of Fairfax, in Virginia, and have continued to reside there until the bringing of the present suit, and that the plaintiff has not brought suit against Brooke in Virginia, then the defendant is not liable in this action. But the court refused to give those instructions as prayed.

E. J. Lee, for the plaintiff in error.

1. The endorsement, being on a blank piece of paper, and delivered with intent to give credit to Brooke, but without an *express* authority to him to fill up the paper with a promissory note, did not authorize him so to fill it up. But if Brooke was so authorized, Patton was not. There does not ap-

pear to have been any communication between Patton and Violett upon the subject.

The cases of *Russel and Langstaffe*, *Doug.* 514. and *Collins* v. *Emett*, 1 *H. Bla.* 313. do not apply; because in those cases it appears that the body of the note was filled up by the person authorized, and who was to use it for his benefit; and because the principles of those cases are not drawn from the common law, but from the custom of merchants, which is not applicable to promissory notes in Virginia, which are there placed upon the same footing as bonds, and subject only to the same common law principles.

2. There was no consideration from Patton to Violett. The defendant in error must show a good and valuable consideration. *Chitty*, 9. 4 *Mod.* 242. 1 *Strange*, 674. *Buller*, 274. 2 *Bl. Com.* 445. 1 *Fonb. Eq.* 331, 332. 335, 336. 7 *Term Rep.* 350. *Rann* v. *Hughes*.

A consideration which will support an *assumpsit* must be either a benefit to the defendant, or a prejudice to the plaintiff; but here Violett received no benefit, and Patton no prejudice.

It does not appear that Patton gave a credit *solely* in consequence of Violett's endorsement. On the contrary, there was no communication between them, so that there was no undertaking on the part of Violett to Patton, except what the law implies from the endorsement; and that implication is founded upon a presumption that the endorsor received value, and can be extended no farther than the value received.

It does not appear that Patton would not have credited Brooke without Violett's endorsement.

3. The endorsement, being in blank, was not a writing signed by him; and the undertaking being to pay the debt of another, is void by the statute of frauds of Virginia.

At common law the holder of the paper had no right to fill up the endorsement so as to make it a promise in writing. Such a right in mercantile cases is founded only on the custom of merchants. The undertaking in writing must set out the precise terms of the promise, as well as the consideration. *Prec. Ch.* 560. *Strange*, 426. 1 *Atk.* 13. 5 *East*, 10. *Wain* v. *Warlters*. Brooke was clearly liable for this debt. And it is laid down as a principle, that if he for whose use the goods are furnished be liable at all, the promise of a third person must be in writing, or it is void. *Roberts*, 209. But if this is a parol promise, it must be made to appear that the credit was given to Violett *alone*. 1 *H. Bla.* 120. 2 *Term Rep.* 80.

4. Violett is not liable, if Brooke, at the time the note became due, and at the time the suit was brought, had property sufficient to pay the amount of the note, and Patton did not at any time bring suit against Brooke.

In *Mackie* v. *Davis*, 2 *Wash.* 219. it is decided that the holder of a bond must use due diligence for the *recovery* of the money. In *Lee* v. *Love*, 1 *Call*, 497. the assignee of a note must *sue* the maker before he can resort to the endorsor.

The case of *Fenwick* v. *Barkesdale*, decided in the court of appeals in Virginia, in *October*, 1803, affirms the general doctrine laid down in *Mackie* v. *Davis*, and shows that a suit is necessary, and is the only kind of diligence which is meant.

It also proves that it is not sufficient to show that the maker of the note was not able to pay *all* his debts; but the plaintiff must go further and show that he was not able to pay the *particular debt* due to him by the note.

The oath which is taken under the insolvent law of Virginia, shows what is meant by the term *insol-*

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vent. He must swear that he is not worth 30 dollars, exclusive of his wearing apparel.

The insolvency of the drawee of a bill is no excuse for neglect to give notice of its dishonour. *Chitty*, 88. *Doug.* 497. 515.

Swann, contra.

The case of *Russel* and *Langstaffe*, *Doug.* 514. is clear as to the authority given by an endorsement on a blank piece of paper.

It is a letter of credit. The defendant has given the bearer of it authority to use it, and cannot deny the authority when it is executed. This is a mercantile transaction depending upon good faith, in which the want of consideration can never be alleged. 3 *Burr.* 1663. *Pillans & Rose* v. *Van Mierop & Hopkins.* It is a *promise in writing*, which is sufficient to take it out of the Virginia statute of frauds. The defendant cannot be permitted to say that the endorsement was blank, and the plaintiff had no authority to fill it up, unless he can show that the confidence he placed in Brooke and the plaintiff has been abused.

If the maker of a note be insolvent when the note becomes due, it is not necessary that the holder should bring suit against him. Brooke might have had property enough to pay this note, and yet be insolvent: And it does not follow because he *might* have paid this note, that he would have paid it if suit had been brought, or that he could have been compelled to pay it.

Youngs, in reply.

No action can be sustained upon the *endorsement* of the note. The act of assembly respecting promissory notes gives no action against the endorsor. It only gives the assignee a right to recover in his own name against the maker. The action

against the endorsor is only at common law, upon the ground that the consideration paid for the note has failed. The legislature of Virginia did not mean to extend the liability of the endorsor farther than that. They had the statute of Anne before them, but they did not choose to adopt it; they preferred to place notes in the class with bonds rather than with bills of exchange. The endorsor is liable only upon the principle of money had and received to the plaintiff's use. 1 *Cranch*, 298. *Mandeville* v. *Riddle*. 2 *Wash.* 219. 221. *Mackie* v. *Davis*. 2 *Wash.* 248. *Norton* v. *Rose*. If there be no consideration, if the defendant has never received value for the note, he is not liable upon any of the grounds stated in those cases. Between immediate parties the want of consideration is always a good defence, even in England. *Kyd*, 276.

In an action against a *surety* for money had and received, you cannot recover if the money were received by the principal, although the surety join in giving a receipt for it. 2 *Term Rep.* 366. *Straton* v. *Rastall*.

In a written agreement to pay the debt of another, the consideration must be stated as well as the promise. 5 *East*, 10. *Wain* v. *Warlters*.

MARSHALL, Ch. J. Do you mean to state that if A. writes a letter to B. stating that if B. will let C. have goods, A. will pay for them if C. does not, A. would not be bound?

Youngs. Probably in that case it would be considered that the letter did state the consideration.

In the case of *Clark* v. *Russel*, 3 *Dal.* 415. it was decided by this court, that the whole agreement must be in writing, and that nothing can be supplied by parol. It must be a complete agreement, or it will not support an action at law. And upon the count for money had and received, you must prove a consideration in money actually received by

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the defendant, and can then recover only the amount of that consideration. Suppose a note endorsed for accommodation at the bank, and the bank refuse to discount it. If the endorsee puts it in circulation can the holder recover upon it against the endorsor?

If the promise be in writing, there must still be a consideration, and you can recover only to the extent of that consideration. 7 *Term Rep.* 350. *Rann* v. *Hughes.*

MARSHALL, Ch. J. The question seems to be whether the declaration must not state the consideration?

WASHINGTON, J. In *Mackie* v. *Davis* there was a special consideration.

LIVINGSTON, J. The case of a promissory note is the only case where you need not state a consideration in your declaration.

MARSHALL, Ch. J. My impression is very strong that in Virginia there has been a general practice to consider an endorsor as liable upon an implied promise; and to declare upon it without averring a consideration.

Youngs. If there must be a consideration to support the *assumpsit*, it must be averred in the declaration. *Simms* v. *Cook*, 2 *Call.* *Winston* v. *Francisco*, 2 *Wash.* 187. *Taliaferro* v. *Robb*, 2 *Call*, 258.

February 23.

MARSHALL, Ch. J. delivered the opinion of the court as follows:

This case comes on upon two exceptions; one to the opinion of the circuit court given to the jury, and the other to the refusal of that court to give an

opinion which was prayed by the counsel for the defendant below.

The declaration contains two counts. One upon the endorsement of a promissory note, and the other for money had and received to the plaintiff's use. The question arising on the first bill of exceptions is, whether the court erred in directing the jury respecting the liability of the defendant below, on the endorsement which was the foundation of the action.

The endorsement was made before the note was written; and it appeared that the body of the note was filled up by Patton. The opinion of the court was, that, if the jury should be satisfied, from the testimony, that Violett endorsed this paper for the purpose of giving Brooke a credit with Patton, and that, upon the faith of the note so drawn and endorsed, Patton did credit Brooke to the amount thereof, the circumstances, that the note was made subsequent to the endorsement, without any consideration from Brooke to Violett, and was filled up by the plaintiff, did not bar the action; and, further, that the said Brooke was to be considered as authorized by the said Violett to make the note to Patton.

This opinion is said to be erroneous; because,

1. The endorsement was made without consideration.

2. It was made on a blank paper.

3. There was no memorandum of the agreement in writing.

In support of the first point, the counsel for the plaintiff in error have cited several cases, intending to prove that an endorsement made without consideration, though it transfers the paper to the endorsee, creates no liability in the endorsor; and that

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a promise in writing, made without consideration, is void.

So far as respects the immediate parties having knowledge of the fact, and so far as relates to an endorsement under the statute of Virginia, this is correct; but the real question in the cause is, does the testimony prove a sufficient consideration for the promise created by the endorsement? This is not intended to comprehend any writing on which an action of debt is given.

To constitute a consideration it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made; and that the promise is the inducement to the transaction. In the common case of a letter of credit given by A. to B., the person who, on the faith of that letter, trusts B., is admitted to have his remedy against A., although no benefit accrued to A. as the consideration of his promise. So in the present case, Patton trusted Brooke on the credit of Violett's name, and Violett wrote his name for the purpose of giving Brooke that credit with Patton. It was, in effect, and in intention, a letter of credit. The case shows that this was both the intention and the effect of Violett's giving his name to Brooke. In conscience, and in substance, then, it is a letter of credit, upon which the money, it was intended to secure, was advanced; and although in point of form the transaction takes the shape, and was intended to take the shape, of an endorsement, yet, so far as respects consideration, the endorsement has the full operation of an undertaking in the form of a letter of credit.

It is common in Virginia for two persons to join in a promissory note, the one being the principal and the other the security. Although the whole benefit is received by the principal, this contract has never been considered as a *nudum pactum* with regard to the security. So far as respects consideration, no

difference is perceived in the cases. Violett has signed his name upon this paper, for the purpose of giving Brooke a credit with Patton, and his signature has obtained that credit. The consideration is precisely the same, whether his name be on the back or the face of the paper.

2. The second objection is, that the endorsement preceded the making of the note.

This objection certainly comes with a very bad grace from the mouth of Violett. He endorsed the paper with the intent that the promissory note should be written on the other side; and that he should be considered as the endorsor of that note. It was the shape he intended to give the transaction; and he is now concluded from saying or proving that it was not filled up when he endorsed it. It would be to protect himself from the effect of his promise, by alleging a fraudulent combination between himself and another to obtain money for that other from a third person. The case of *Russel* and *Langstaffe*, reported in *Douglass*, is conclusive on this point.

3. The third objection is, that there was no memorandum of the agreement in writing.

The argument on this point is founded on the idea that the statute of frauds in Virginia is copied literally from the statute of Charles II. This is not the fact. The first section of the act of Virginia differs from the 4th sec. of the stat. of Charles II. in one essential respect. The statute of England enacts that no action shall be brought, in the cases specified, "unless the *agreement* on which such action shall be brought, or some memorandum or note thereof shall be in writing," &c. The Virginia act enacts that no action shall be brought in the specified cases, "unless the *promise* or agreement on which such action shall be brought, or some memorandum or note thereof shall be in writing," &c. The reasoning of the judges, in the cases in which they have decided that the consideration ought to be

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in writing, turns upon the word *agreement*, of which the consideration forms an integral part. This reasoning does not apply to the act of Virginia, in which the word "*promise*" is introduced.

It was thought proper to notice this difference between the act of parliament, and the act of Virginia, although the opinion of the court is not determined by it. In this case the assignment does express a consideration. It is made for value received.

It is unnecessary to decide in this case, whether the declaration ought to have alleged that the endorsement was made on consideration. With that question the jury had no concern, and the direction of the court was not affected by it. There being no demurrer, it could only occur in arrest of judgment. But on a motion in arrest of judgment, the defendant below could not have availed himself of this error, if it be one, because there are two counts in the declaration, one of which is unquestionably good, and the court cannot perceive on which the verdict was rendered. By the act of jeofails in Virginia, there is no error if any one count will support the judgment.

The second exception is to the refusal of the circuit court to give the opinion, prayed for by the counsel for the defendant below.

When the error alleged is, not that the court has misdirected the jury, but that the court has refused to give a particular opinion, the opinion demanded must be so perfectly stated, that it becomes the duty of the court to give it as stated.

In this case, the opinion required by the counsel consists of two parts. The first is to instruct the jury "that if they shall be satisfied, from the evidence, that Richard Brooke, the maker of the note in this case, had, at the time the note became due, *or at any time previous to the commencement of this suit* against the defendant, property sufficient to pay

the debt claimed," &c. and the plaintiff brought no suit, then this action is not maintainable.

This court conceives that the circuit court ought not to have given this opinion. Had Richard Brooke possessed property before the making of the note, and not afterwards, the opinion, in the terms in which it was required, would have been a direction to find their verdict for the defendant. So if Richard Brooke had been in possession of property for a single day, and had the next day become insolvent, the court was asked to say that, in such a case, the endorsor could only be made liable by suit against the maker. Such a direction, in the opinion of this court, would have been improper.

The second branch of the opinion the circuit court was required to give, is in these words: "Or if the jury shall be satisfied that the said plaintiff and the said Brooke have, since the said note became due, both lived in the county of Fairfax, in Virginia, and have continued to reside in the county of Fairfax until the beginning of the present suit, and the plaintiff hath not brought suit against the said Brooke in Virginia, then the defendant is not liable in this action."

If the plaintiff had sued Brooke elsewhere than in Virginia, or if Brooke had become insolvent previous to the making of the note, and had continued to be so, the opinion of the court, if given as prayed, would have been, that, still, a suit against the maker of the note was necessary to give a right of action against the endorsor.

This is not understood to be the law of Virginia. It is understood to be the law, that the maker of the note must be sued, if he is solvent, but his insolvency dispenses with the necessity of suing him. It is not known that any decision of the state courts requires that this insolvency should be proved by taking the oath of an insolvent debtor, nor is it believed that this is the only admissible testimony of

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the fact of insolvency. Other testimony may be admitted. It would therefore have been proper to leave it to the jury to determine whether it was, at any time, in the power of the plaintiff to have made the money due on this note, or any part of it, from the maker by suit; and their verdict ought to have been regulated by the testimony in this respect.

This opinion was not required.

This court is of opinion that there is no error, and that *the judgment is to be affirmed with costs.*

PIERCE *v.* TURNER.

The act of assembly of Virginia, which makes unrecorded deeds void as to *creditors*, and *subsequent purchasers*, means creditors of, and subsequent purchasers from, *the grantor.*

ERROR to the circuit court of the district of Columbia, sitting at Alexandria, in an action of debt brought by Pierce against Rebecca Turner, charging her as executrix in her own wrong of her late husband, Charles Turner, deceased.

Upon the issue of *never executrix*, the jury found a special verdict, stating in substance the following case:

A marriage settlement, conveying the wife's land and slaves to trustees, by a deed, to which the husband was a party, although not recorded, protects the property from the creditors of the husband.

On the 14th of February, 1798, the defendant, by the name of Rebecca Kenner, being a *feme sole*, and seised and possessed, in her own right, of certain land and slaves, conveyed the same by deed, in consideration of an intended marriage between herself and Charles Turner, to trustees, to be held in trust for the use of herself until the marriage should be solemnized, and from and after the solemnization thereof to the use of herself and the said Charles Turner, and the *longest liver of them*, and from and after their deaths, to the use of *her heirs*. The deed purports to be an indenture tripartite, in which Charles Turner is named as the second party, and as such he duly executes the deed;

he does not, however, make any settlement of his own property upon his intended wife, but appears to be made a party merely for the purpose of testifying his privity and consent.

About four months after the execution of the deed, two of the three subscribing witnesses proved the execution before the county court of Fairfax, where all the parties inhabited. That probat was duly certified by the clerk under direction of the court. But the deed purporting to be a conveyance of land as well as slaves, and one of the subscribing witnesses, soon after the execution of it, having left the United States, and never having returned, the deed was not fully admitted to record, but remained in the clerk's office under the certificate of probat before stated, until the 1st of September, 1807, when the county court, upon proof of the absence of the third subscribing witness, and of his hand-writing, admitted the deed to record; all which is certified by the recording clerk, and found by the special verdict.

Soon after the execution of the deed, and in the same month, (February, 1798,) the contemplated marriage took place; whereupon the trustees put Turner into possession of the land and *slaves*, and he continued possessed of the same, with the knowledge and approbation of the trustees, till his death, which happened some time in the month of December, 1802, less than five years from the time of his marriage, and of his first coming into possession of the property.

Turner and his wife resided in Alexandria from the time of their marriage till the autumn of 1801, when they removed into the county of Northumberland, in the state of Virginia, taking the slaves with them by consent of the trustees; they continued to reside there, upon the land in the deed mentioned, on which the slaves were kept, till his death, in December, 1802. Upon his death she remained in possession both of the land and slaves, claiming exclusive property in the same, and to

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hold possession of the same with the privity and approbation of the trustees, whose privity and approbation are expressly found. In the autumn of 1803, the defendant removed back to Alexandria, in the district of Columbia, and brought with her a part of the slaves, (of value sufficient to satisfy the plaintiff's debt,) and has ever since resided in Alexandria, and there used the slaves so brought with her.

Three months after Turner's death, and seven months before the defendant removed from Northumberland back to Alexandria, the county court of Northumberland, finding that no person would apply for administration of the intestate's estate, committed the administration to the sheriff of the county, under a particular statute of Virginia. The sheriff returned an inventory of assets appriz-ed at 4,631 dollars and 72 cents, which was distributed in due proportions among the creditors, under the special direction of the court. But the plaintiff put in no claim, and, not being on the list of creditors reported to the court, received no part of the sum so distributed. None of the slaves conveyed by the said deed were meddled with in the course of the sheriff's administration, nor included in the inventory and appraisement, although they were all then in the county, and some of them have continued in the county ever since Turner's death. It is found that Turner died insolvent, unless the said slaves are charged with his debts.

By the 4th section of the act of assembly of Virginia, entitled "An act for regulating conveyances," it is enacted, "that all conveyances of lands," "and all deeds of settlement upon marriage wherein either lands, slaves, money or other personal thing shall be settled," "and all deeds of trust and mortgages whatsoever," "shall be void as to all *creditors and subsequent purchasers*, unless they shall be acknowledged, or proved and recorded according to the directions of this act; but the same, as between the parties and their heirs, shall nevertheless be valid and binding."

The deed in question never was proved or acknowledged and recorded according to the directions of the act; and the question was, whether it was void *as to the creditors of the husband*, so as to charge the widow as his executrix in her own wrong.

The opinion of the court below was, that the deed was good and effectual to prevent the property vesting in the husband by virtue of the marriage, and consequently was never liable for *his* debts. That at the time of the marriage no *legal* estate in the slaves was vested in the wife, and therefore nothing was transferred to the husband by the marriage.

E. J. Lee, for the plaintiff in error.

By marriage all the personal estate of the wife becomes the absolute property of the husband. The operation of this principle can only be prevented by pursuing strictly the mode pointed out by law. This deed wants those legal solemnities which the law requires to make it valid against creditors. The plaintiff is a creditor; the deed is, therefore, not valid against him. The word *creditor*, in the act of assembly, means not only the creditors of the grantor, but the creditors of every person whose debts could have been legally satisfied out of the property, if such deed had not been made. If the word is to have the limited construction contended for on the other side, and the deed be void only as to *her* creditors, and as to subsequent purchasers from *her*, the statute becomes nugatory; because after marriage *she has no creditors*, and *cannot sell and convey*. Her creditors have become his creditors; her debts have become his debts. If the deed be void as to *her* creditors, it must be void as to *his* creditors. If she can neither sell nor have creditors, the act must apply to his creditors, or it will be idle and unavailing.

If the husband had sold these slaves to persons ignorant of the deed, the sale would have been valid

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If he had been trusted upon the faith of this property, which he had in his possession, and which was supposed to have come by his wife, such creditors, who were ignorant of the deed, would have a right to payment out of this property. If they could not, the possession of the slaves would have been a fraud upon such creditors.

It is true, in the present case, the debt was contracted before the marriage, but that cannot alter the principle of law. If the deed be void as to *any* of his creditors, it is void as to *all.*

The term *creditors* is general, and literally comprehends creditors of the husband, as well as creditors of the wife. Where the words of a statute are plain, the court cannot indulge any latitude of construction, but must pursue the words. 3 *Call*, 106. 2 *Call*, 183. *Eppes* v. *Randolph.*

If the property was liable for the husband's debts, it was assets, and her appropriating it to her own use, makes her an executrix in her own wrong; (*Toller*, 17.) although she did it claiming them as her own, and under a void deed; 2 *Vin. Abr.* 211. 2 *Term Rep.* 588. *Edwards* v. *Mercer. Cro. Jac.* 270. *Hawes* v. *Loring.* 2 *Bac. Abr.* 338. 5 *Co.* 34. a., even if there be a rightful administrator. But the possession taken by the sheriff of Northumberland county was not an administration. 2 *Term Rep.* 97.

If this deed be valid against creditors, no marriage settlement need be recorded. It renders unnecessary all the precaution which the legislature so anxiously took to prevent this kind of fraud and imposition.

C. Simms, *P. B. Key* and *Jones*, contra.

The act for regulating conveyances, as it relates to creditors and their debtors, was intended to protect the former against secret deeds and conveyances made by the latter; it never was intended to

injure the rights of third persons, *who do not claim under the debtor.*

Lord Mansfield, in the case of *Cadogan* v. *Kennett*, *Cowp.* 434. speaking of the statute of 13 *Eliz.* c. 5. which relates to frauds against creditors, says, that "such a construction is not to be given in support of creditors as will make third persons sufferers."

If there is any difficulty in the construction of this act it arises from the generality of the expression "*creditors and subsequent purchasers.*"

The first section of the act declares, that no conveyance shall be good against any creditor or purchaser, for valuable consideration, not having notice thereof, unless it be acknowledged or proved by three witnesses, &c.

What purchaser is intended by this act? Unquestionably a purchaser from the person who made the first deed. The effect or operation of the act, is to give validity to the second deed duly proved and recorded in preference to a prior deed, not duly proved and recorded; and not to invalidate the first deed, in favour of a purchaser for a valuable consideration from a person other than the maker of the first deed.

To illustrate the subject; suppose A. the rightful owner of property makes a conveyance of it to B. which is not recorded. C. who sets up a claim to the property, sells and conveys it to D. for a valuable consideration, and the deed is duly recorded; would the deed from A. to B. be considered as void against D. who does not claim under A.? certainly not. Then the subsequent purchaser must claim under the person who made the first deed, or the first deed cannot be considered void as to him. So the general term "*creditors,*" used in the act must, for the like reasons, be understood to mean the creditors of the grantor or bar-

gainor in the first deed, and none but *such* creditors can set aside the deed.

If A. by deed conveys property to B. and the deed is not recorded according to the act. C. the heir of A. contracts debts. The creditors of C. would have no lien or claim on the property conveyed by A. to B., nor would it be liable in any manner to C.'s debts; yet, but for the deed, the land would have descended to C. The right which creditors have to the property of their debtor is *derivative*. If *he* never had a right to the property, *they* can have none. Charles Turner never had any right to this property, unless under the deed.

Rebecca Kenner, before the marriage, was the sole and absolute owner of it, and was fully competent to dispose of it as she thought proper.

She did dispose of it by a deed to trustees, which she was competent to make, which was completely binding upon her, and which devested from her all legal title and claim to the property. At the time of the marriage she had no legal estate in her which could, by operation of law, be transferred to her husband by the marriage. As he was a party to the deed, and thereby assented to it, he was bound by it, and could never set it aside. Between all the parties to the deed it was as valid and binding as if it had been duly acknowledged and recorded. The creditors of Charles Turner can claim nothing which he could not claim. If the marriage did not transfer the property to *him*, *they* cannot claim it at law. What never was *his* cannot be *theirs*.

If the property never was his, so as to be assets, the defendant can never be charged as executrix in her own wrong for taking possession of it.

But even if this property should finally be adjudged to be assets, yet we contend she is not liable as *executrix de son tort*. If she took possession of the slaves on a fair claim of property, believing her-

self lawfully entitled to them, it cannot amount to such a tortious act as will charge her as *executrix de son tort*. *Bro. Abr. Administrator, pl.* 36. *Executor, pl.* 162. *Fitz. Abr. Executor, pl.* 65. *Roll. Abr. Executor, pl.* 417. 11 *Vin. Abr. Executor, C. a. and B. a. pl.* 5. 2 *Leon.* 226. *Com. Dig. Administrator, C.* 2. *Freem.* 13. *pl.* 12. *Dyer*, 166. *Stokes* v. *Porter*.

The deed was good at law between the parties, and by the assent of her trustees she had a legal right to the possession; and wherever a person comes lawfully into the possession of the goods he can never be charged *as executor de son tort*. The rightful executor could never claim these slaves as assets, because the deed was good between the parties, and he would be estopped by the sealing and delivery of the deed by Charles Turner, his testator.

If the creditors of the husband have any remedy, it must be in equity; where it is a well settled principle that if the representatives of the husband are obliged to resort to equity to get possession of the wife's estate, they shall first make her an adequate settlement. She is considered as a fair creditor to that extent. 1 *Fonbl. c.* 2. § 6. *p.* 87. *note k.* 10 *Ves.* jun. 360. *Rider* v. *Kidder*. 1 *P. Wms.* 382. *Jacobson* v. *Williams*. And so far from setting aside such a deed as this, a court of equity will enforce a mere agreement for a settlement even in opposition to creditors.

If this were a contest between the creditors of the wife, and the creditors of the husband, the contest must be decided in favour of the former. "Though the husband by the marriage adopts the wife and her circumstances together, and is liable to her then debts, *yet he is liable to them only during the coverture, unless the creditor recover judgment against him in the life-time of the wife;* nor can a court of equity make him liable in respect of the fortune which he may have had with her." 1 *Fonb.* 91. *c.* 2. § 6. 1 *P. Wms.* 461. *Earl of Thomond* v.

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Earl of Suffolk. 3 *P. Wms.* 410. *Heard* v. *Stamford. Forrester*, 173. *Her* debts do not by the marriage become absolutely *his* debts. Her creditors do not lose their right of action against her; but after his death may pursue their remedy against her and her separate estate.

The terms debtor and creditor are correlative. The creditor meant by the statute must mean the creditor of that debtor whose deed is to be set aside.

This deed was not void *ab initio* as to any creditor of either of the parties. For eight months it was valid as to all creditors; and is still valid as to all the parties.

Here is no fraud, either legal or moral, as to the creditors of the husband. The consideration of marriage is a fair, a valuable, and a highly favoured consideration, and has always prevailed, both at law and in equity, even against creditors.

The plaintiff's counsel, however, set up the marriage itself to defeat the deed made in consideration of that marriage.

The case of *Edwards* v. *Mercer*, 2 *Term Rep.* 588. was a case of fraud. It was void *ab initio;* not by reason of the omission to record it.

MARSHALL, Ch. J. mentioned the case of *Anderson* v. *Anderson*, 2 *Call*, 204. where it seems to have been decided that the word *creditor*, in the act, included creditors of the husband as well as creditors of the wife.

Jones. That was not the case of a conveyance, but of a contract before marriage without the intervention of a trustee. This contract did not, and could not, prevent the legal operation of the marriage which transferred every thing to the husband. The wife was possessed of the legal estate at the time of the marriage. But in the present case the

deed was good, and no legal estate remained in Rebecca Kenner, at the time of her marriage.

Swann, in reply.

The words of the act are, that the deed shall be void as to "*all creditors and subsequent purchasers*" unless, &c. The plaintiff being a creditor, it is void as to him. By the marriage the property, as to the plaintiff's claim, vested in Charles Turner, in the same manner as if Rebecca Kenner had transferred it to him by deed duly acknowledged and recorded. He received possession of them, and from that possession acquired credit with the plaintiff and others. If this property should not be rendered liable to his debts, the object of the law will be frustrated.

To restrict the term *creditors* to the creditors of the *grantor* is neither consistent with the letter nor the spirit of the law.

If this construction be correct, the creditors of a subsequent purchaser are not entitled to the benefit of this act. If the property should pass through the hands of six purchasers, would not the creditors of the last purchaser be entitled to seize it? And shall the vendor set up a secret deed, and claim it, because the creditor is not his creditor? How would this differ from the case of a creditor of the first purchaser? The claim of such a creditor would be good against the secret deed of the vendor.

The marriage being a purchase; the creditor stands upon the same ground.

The creditors of the vendor and purchaser have a right to consider the deed as null.

If the vendor retains possession of the property, and appears to be the owner, the creditor may seize it notwithstanding a secret unrecorded deed.

So if a purchaser has obtained a deed for it, and

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is the apparent owner of it, the creditor of the purchaser may seize it notwithstanding a secret unrecorded deed.

Unless the act of assembly has this operation, it has none, and no marriage settlement will be recorded in future.

The derivative title may be better than the original; as in the case of a purchaser without notice from a purchaser with notice.

Charles Turner had notice, but if he had sold to a purchaser who had not notice, this purchaser must have held the property against this unrecorded deed. *Sugden's Law of Vendors*, 448. 2 *Vern.* 384. *Amb.* 313. 2 *Atk.* 242.

The deed was void *ab initio* as to creditors, as soon as the time for recording had elapsed.

March 13.

WASHINGTON, J. delivered the opinion of the court as follows, viz.

This is an action brought by a creditor of Charles Turner, against Rebecca Turner, who is charged as his executrix; and the questions submitted to the consideration of the court are, 1st. Whether the slaves, mentioned in the deed of the 14th of February, 1798, are to be taken as assets belonging to the estate of Charles Turner; and if so, then, 2d. Whether Mrs. Turner can, under the circumstances of this case, be properly charged as an executrix of her own wrong? If the first question be determined in favour of the defendant in error, it will become unnecessary to consider the second; as it does not appear that Mrs. Turner intermeddled in any manner with the estate of her deceased husband, unless these slaves did, in point of law, constitute a part of that estate.

The first question depends upon the construction which the court may give to the 4th section of the statute of Virginia, passed on the 13th of December, 1792, entitled "An act for regulating conveyances," which declares that all conveyances of land, marriage settlements of lands, slaves, or other personal property, deeds of trust and mortgages thereafter made should be void as to *all creditors and subsequent purchasers*, unless the same were acknowledged or proved, and recorded within the time prescribed by the statute; but that the same as between the parties and their heirs should nevertheless be valid and binding.

The deed from Rebecca Kenner, the defendant in error, previous to her intermarriage with Charles Turner, by which the slaves in question were settled on the said Charles Turner and herself, during their lives, and the life of the longest liver of them, with remainder to the heirs of the said Rebecca, not having been proved and recorded within the time prescribed by law, it is contended by the plaintiff in error that the same became void as to the creditors of Charles Turner, whose rights remained unimpaired by that deed, in the same manner as if it had never been made; in which case, it is not denied that an absolute estate would have vested in the husband, on his marriage.

This argument proceeds upon the ground, that by the words "all creditors and subsequent purchasers," is meant as well the creditors of the grantee and subsequent purchasers from him, as those who might derive title under the grantor. Although the words are certainly broad enough to comprehend the whole, it is believed by a majority of the court that the construction should be such as to limit the application of them to the creditors of, and subsequent purchasers from, the grantor. In no case but one, where a title can be set up for the grantee paramount the deed, can it ever be the interest of a creditor of the grantee to insist upon such a construction as is contended for in this; for as he must derive his title

under the deed, if it be void as to him, it is impossible for him to found a claim upon it in right of the grantee, whose only title is under the deed. It would be strange that a deed should be binding upon the grantee and his heirs, and yet void as to persons claiming under him, for a valuable consideration; and yet such would be the consequence, if the words "all creditors and subsequent purchasers" should be understood to apply to persons claiming under the grantee as well as those claiming under the grantor. Indeed it would seem repugnant and absurd to apply the same expressions to persons, who, if they claim at all, must claim under the deed, and also to those who claim against the deed; in the latter case, the invalidity of the deed is consistent with the claim, in the former it is destructive of it.

It may be said, however, that these observations are inapplicable to this particular case, because the creditors of the husband do not claim under but against the deed; and, in this respect, stand upon the same ground as the creditors of the grantor. But if in every other case which can be stated, the invalidity of the deed is applicable to the creditors of the grantor, or those claiming under him, and to none other, by what rule of construction can the same words have a more extended meaning, so as to be applied to persons who claim in right of a party to the same deed other than the grantor. If the deed in question had granted to Charles Turner an estate in fee as to the land, and for life in respect to the slaves, would it have been void as to simple contract creditors, who could go only against the personal estate, and good as to specialty creditors, who might subject the real assets? and yet, if the deed be void at all, as to the *creditors of the husband*, it must be so throughout; in which case it might well be doubted whether the land could be made liable to the payment of the husband's debts; or, to present the question in a less doubtful shape, would the deed be considered void as to a purchaser, from the husband, of the slaves, and good as to a purchaser of the land? Let the true interpretation of the words "all

creditors and subsequent purchasers" be once ascertained, and every difficulty in the case is at an end. If they are construed to mean the creditors of the grantor, or subsequent purchasers from him, then, the deed being good between all the parties to it, no estate vested in Charles Turner, but such as the deed itself passed to him. The title of his creditors being clearly derivative, if he had no title under the deed, (and being himself bound by it, he could have none which was inconsistent with it,) then his creditors could have none. But if he had a title incompatible with that granted by the deed, then he was not bound by the deed; contrary to the statute which declares that he was bound. If his creditors have any such title, it cannot be derived from him, when, in point of law, he had none in himself; and, independent of his title, it is impossible to show any in them. If a subsequent purchaser, with notice of a prior unrecorded deed, could not prevail against the title of the first purchaser, and most unquestionably he could not, how much stronger is the case when such subsequent purchaser is even a party to the first deed, and claims an interest under it? To say in this case, that, upon the marriage of Charles Turner, or at any time afterwards, the law cast upon him an estate in the property conveyed by this deed, of which he had notice, and to which he was a party, inconsistent with the estate conveyed to him by that deed, (and this must be said, if his creditors can claim such estate in his right,) is, in the opinion of a majority of the court, repugnant to the plain meaning and spirit of the law under consideration.

That creditors of the husband, or purchasers from him, may be injured by the construction which this court feels itself compelled to give to this law, need not be denied; but it is not for this tribunal to afford them relief. It might, perhaps, be well if the law were so amended as to render deeds made in contemplation of marriage void in express terms, as *to the creditors of the husband, or purchasers from him*, in case the same should not be recorded within the time prescribed by law.

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The court has felt some difficulty in consequence of a decision of the court of appeals in the case of *Anderson* v. *Anderson;* but it is believed that the judgment in that case was perfectly correct, let the particular point which occurs in this cause be settled one way or the other. In that case, the contract was not only executory and rendered void, at law, by the subsequent intermarriage of the parties to the contract, but it was, at the time when the slaves were taken in execution, perfectly contingent whether the wife could ever claim any interest in them, in opposition to persons deriving title under the husband. For if the husband should have survived the wife, or if they should have had issue, the absolute legal estate of the husband, gained by the intermarriage, would have remained unaffected by the deed. There was, therefore, no reason why the creditors of the husband should be prevented from receiving satisfaction of their debts out of his legal estate in the slaves, because it was subject to an equitable contingent interest in the wife, which might never become effectual. A court of equity might well say to her, as you have no remedy, at law, for a breach of the contract by the husband, in consequence of not having interposed trustees to protect your rights, and have omitted to record the deed by which creditors and subsequent purchasers might be defrauded, we will not now decree you a specific performance against creditors who have law and equity on their side.

Decree affirmed.

JOHNSON, J. I am unfortunate enough to dissent from my brethren in this case. I think the creditors of Turner entitled to recover, and entitled to recover in *this form of action.*

I will not contest the general principle, that the creditors, to whose benefit this act must be understood to operate, are the creditors of that party only from whom the estate moves. But this case presents an exception to the general rule; and the rea-

soning, from which the general conclusion results, will be found inapplicable to the case of husband and wife, with regard to the personal estate of the latter.

The words of the act are admitted to be sufficiently comprehensive to include the creditors of both: the general rule is, that the letter must prevail; and it is only when an adherence to the letter will involve a court in absurdity, or inextricable difficulty, that the spirit is resorted to as a restriction upon the literal meaning. But the construction which I give to this act removes repugnance and absurdity, and produces a concordance between the letter and the spirit, which appears to my mind conclusive upon its correctness.

What was the object of the legislature? It was to protect the community from that false credit which men acquire in society, from the possession of or supposed interest in property; to place within their reach the means of avoiding those frauds which may be practised upon them, by the possessor of property, when an estate or interest in it exists, in fact, in some other person.

The argument in favour of the defendant is, that the creditors of the grantee can derive no benefit from a deed which the act declares void, and which, consequently, could vest no interest in their debtor. Through him they must claim, and no other estate but that which existed in him, ought to be subjected to their debts.

I will not pass an opinion upon the correctness of an argument which, in the case where possession follows the alienation, may make the act productive of the very fraud which it was intended to obviate. My opinion is founded upon a ground which is unaffected by the conclusion upon this point, or rather in perfect coincidence with that conclusion. I deduce my conclusion from the consideration that the claim of Turner's creditors is not derived through

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the deed, but is, in fact, in direct hostility with its operation. The effect of the marriage, in transferring the property to the husband, is the foundation of their claim; and the deed executed on the intermarriage of the defendant with Charles Turner, constitutes the subject of the defence against their claim. The creditors, in order to maintain their action, prove, first, the property in the wife before marriage, then her intermarriage with their debtor. These facts, in operation of law, upon her personal property, sustain their right of recovery. But, in opposition to their claim, the wife endeavours to avail herself of this deed; and this question is brought up on an exception taken by the creditors to its legal validity. The ground of their objection is, that it wants that evidence of authenticity, which the law requires, to make it, as to them, a valid instrument. No doubt is entertained with regard to the invalidity of this instrument, as to the description of creditors; but it is contended, on behalf of the defendant, that no other creditors can avail themselves of that objection, except the creditors of the wife before marriage. There appears to me to be no reason for the distinction in the case of husband and wife. Her creditors before marriage become his during coverture; she can contract no debts to which she can be made personally liable; her personal property becomes his by the act of intermarriage, and he acquires all the credit, in society, resulting from the acquisition and possession of that property. It is not upon a deed, which this act declares void, that the creditors found their claim, but upon an act in *pais*, the operation of which is an immediate transfer of property, unless that effect be prevented by the legal execution of some instrument of writing. If such an instrument, executed before marriage, be not recorded within eight months, it loses all legal validity as to creditors, and it is the same as if no such instrument had ever been executed. The recording, as to them, is as necessary as the sealing and delivery is between the parties.

The consistency of this opinion with the argument that the creditors of the grantee can derive no interest under a deed which, as to them, is declared void, will appear from distinctly reflecting on the necessary consequence of such an admission in this case. Declare the deed void, and what is the consequence? It no longer affects the property of the wife, so as to produce a state of things different from that which would exist if it had never been created; and the operation of the deed was not to vest an interest or estate in Charles Turner, but to prevent any estate from vesting in him by the ordinary effect of marriage. Remove the preventing cause, and the property becomes, unquestionably, subject to the husband's debts.

Two objections to this opinion have been urged, on which it may be proper to make some remarks. The first that I shall notice is, how the same deed can be valid as between the parties, so as really to prevent any transfer of property to the husband, and yet, through him, creditors may derive such an interest as to subject it to the payment of his debts. If this argument proves any thing, it proves too much. A moment's reflection will show, that it is as applicable to the case of the grantor as of the grantee; for, after the execution of the deed, the grantor has, in fact, and in the acknowledgment of the act, no more interest in the property than the grantee had before its execution, or upon its becoming void for want of recording. But every apparent absurdity may be reconciled thus. Legal claims must be supported by legal proof. The abstract rights of parties become immaterial, if not susceptible of substantiation by evidence. In a question, then, between the direct representatives of the husband and wife, the deed is a valid instrument, and may be received as duly authenticated written evidence, to support a right derived under it. But, between the one party and the creditor of the other, the law declares it wholly inefficacious, for want of a ceremony which is made essential to its authenticity. The most ordinary deed cannot be

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received in evidence until proved according to the rules of evidence; and the operation of individual acts, in producing transfers of property, must ever be subject to such modifications as may be made by positive law.

The other difficulty arises from the consideration how this deed can be valid against all persons (which it confessedly is) during eight months, and then cease to operate as to creditors. To this it may be answered, that this objection, as well as the preceding, is equally applicable to the case of the creditor both of alienor and alienee; and, if valid at all, might defeat the operation of this act altogether. But, as a provision of positive law, such considerations are not to defeat it. Possibly some inconvenience may result from holding property in this suspended situation; but the duration of the inconvenience is not long, nor the contingency far remote. Nor is an analogous state of things unknown to the common or civil lawyer; executory devises, contingent remainders, and shifting uses, produce a similar uncertainty and suspension of right. During the eight months which are given for recording a deed, the interests of parties must have vested only *sub modo*, or subject to the contingency of recording it within the legal time: and no doubt a court of equity would interpose its authority, during that period, to adjust the rights of parties. Nor will this objection at all affect the opinion which I entertain respecting the rights of the plaintiff; for, although the deed certainly did hold the personal property of the wife in a suspended state, during the eight months, so that the creditors could not, in that time, have taken it under execution, yet, after the expiration of that period, the deed lost its protecting effect, and that property then became subject to their debts.

These views of the subject appeared to me to solve every difficulty, and lead to a conclusion upon the second point made in the argument; viz. whether the defendant may be charged as executrix *de son tort*. The case of *Harding & Mercer* comes

fully up to the present, and it will be found of necessity, in order to give effect to this act, that this remedy should be countenanced. The hardships of it would, no doubt, be remedied by a court of equity, in cases free from collusion or moral fraud, so as to prevent the defendant from being charged to an amount greater than the value of the goods which actually came to her hands. But the necessity of sanctioning this mode of pursuing property, circumstanced as in this case, will appear from the impossibility of a creditor's getting at it in any other manner, at law. Should the creditor himself administer, he can never recover it, because, as the legal representative of the husband, the deed would be valid against him without being recorded. Should any other person administer, he could never be charged with the value of assets, which for the same reason, could never come to his hands. So that both precedent and principle concur in supporting the correctness of permitting him to resort to the present remedy.

KEMPE'S LESSEE *v.* KENNEDY ET AL.

ERROR to the circuit court of the district of New-Jersey, in an action of ejectment brought by John Den, lessee of *Grace Kempe*, a British subject, against R. Kennedy and M. Cowell, citizens of the state of New-Jersey, for land in that state.

The inferior court of common pléas for the county of Hunterdon, in the state of New-Jersey, in May, 1779, had a general jurisdiction in all cases of inquisition for treason, and its judgment, although erroneous, was not void, inasmuch as the court had jurisdiction of the cause.

Upon the trial of the cause upon the general issue, a bill of exceptions was taken by the plaintiff, which presents the following case:

Grace Coxe, the lessor of the plaintiff, being seised in fee of the land in question, before the year 1772 intermarried with John Tabor Kempe, who died in August, 1792. They resided in New-York before and during the war with Great Britain, and went to Great Britain when New-York was eva-

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cuated by the British army. Grace Kempe, since the death of her husband, has continued to reside, and now resides, in Great Britain, where he died; having been in possession of the land in right of his wife, on the first of March, 1776, and until the same was seized by the authority of the state of New-Jersey.

The defendants relied upon several acts of the legislature of New-Jersey; an inquisition taken under the authority of those acts; a judgment of the inferior court of common pleas for the county of Hunterdon, in May, 1779, upon that inquisition, confiscating the estate; a judgment of the inferior court of common pleas for the county of Sussex; an execution upon that judgment; and a deed from Joseph Gaston, an agent for the state of New-Jersey, to the defendant Kennedy, whose tenant the other defendant was; and proved, that he had always been in possession under that deed from the day of its date, to the day of trial.

Upon this case the plaintiff prayed the court to instruct the jury that they ought to find a verdict for him; which the court refused, and directed the jury that they ought to find a verdict for the defendants; to which refusal and direction the plaintiff excepted, and brought his writ of error.

R. Stockton, for plaintiff in error.

This case turns on the validity of the forfeiture and confiscation under the acts of the state of New-Jersey.

The great objection is, that Mrs. Kempe was not an object of those laws.

The whole question depends upon the act of the 11th of December, 1778, entitled "An act for forfeiting to, and vesting in, the state of New-Jersey, the real estates of certain fugitives and offenders, and for directing the mode of determining and satisfying the lawful debts and demands which may

be due from, or made against, such fugitives and offenders, and for other purposes therein mentioned;" by the 3d section of which it is enacted, "that each and every person, not an inhabitant of this state, but of some of the other United States, and seised or possessed of, interested in, or entitled unto, any estate, real or personal, within this state, who hath, since the 19th day of April, 1775, aided or assisted, or doth now, or hereafter may, aid or assist the enemies of this state, or of the United States, by joining their armies within this state, or elsewhere, or who already hath, or hereafter shall have, voluntarily gone to, taken refuge or continued with, or endeavoured to continue with, the enemy aforesaid, and aid them by counsel, or otherwise, shall be, and is hereby declared to be, guilty of high treason against this state; and on conviction thereof by inquisition found, and final judgment entered thereon in favour of the state, in manner herein after declared, such conviction shall amount to a full and absolute forfeiture of such offender's estate, both real and personal whatsoever, within this state, to and for the use of the same. Provided always, that such conviction shall not in any instance extend to affect the person of any such offender, but shall operate against his or her estate only."

Mrs. Kempe does not come within any of the descriptions of offenders in this section.

The inquisition charges, that Kempe and wife are offenders against the act of 11th of December, 1778, in this, "that the said John Tabor Kempe and Grace his wife, *did go* to the enemy, and *took refuge* with them some time in April, 1776, and *still remain with them*," "against the form of their allegiance to this state."

The truth of the fact is, that they did not go to the enemy, but remained at their own homes, and the enemy came to them.

But take the fact as charged; *she and her husband*, i. e. *she in company with her husband; and legally, by the command and control of her husband*, in April, 1776, went to the British and remained with them.

This is a joint charge for a joint act of the husband and wife; and is in the technical language always used when the wife is charged with concurring in the act of the husband.

Here then is a *feme covert* charged under this section for accompanying her baron in *April*, 1776, before any government was established, before any law defining treason, and even before New-Jersey had formed her constitution, and before any prohibition of the act done by her. She simply *remained with her husband*, without affording any aid to the enemy.

Such a person is not within the purview of this section, and therefore, though the forfeiture perhaps operated on the interest of the husband, it did not reach the estate of the wife.

We contend,

1. That this section does not extend to *femes covert* acting with, and therefore by presumption of law under control of, their husbands.

And, 2. That if it did extend to any *feme covert*, yet it did not extend to one who only *went* and *remained*; she must have *aided and assisted*.

1. No *feme covert* is within the act. It is confined to those who *voluntarily* go and remain. It supposes a *free will*, a *volition*, an election to go or stay: but a *feme covert* in the presence of her baron, has no will; and on the subject of residence, she can have no will different from his. She is bound by law to live with him if he requires it. This would be the case at all times, even after

the passing of these laws; for as freedom of will is of the essence of all crimes, a woman cannot commit a crime of this sort, not even this species of treason, by obeying her husband.

But when this fact was done there was neither government nor law to offend against. The only law which existed placed her under the dominion of her husband. He had the right to command, and the power to compel her to go and remain with him, and she had neither right to refuse, nor power to resist.

But if these laws had then existed, she could not be charged for any breach of them in company with her husband. 1 *Hawk.* 3. § 9. 1 *Hale*, 47. Receiving her husband, knowing him to be a traitor, is not treason.

The facts of her coverture, and going and remaining with her husband, appear upon the face of the inquisition itself, and clearly show that she could not have been an offender against the act, and therefore that *her* estate was not forfeited.

Nor can the legislature be presumed to have intended to include persons in her situation; for that would have been cruel. They did not mean to legislate against the most important duties of social and domestic life, to cut asunder the bands of matrimonial union, to compel a wife to abandon her husband or forfeit her estate.

Mrs. Kempe, not having the capacity voluntarily to commit the offence, was not an object of the law, and, consequently, the justice who took the inquisition had not jurisdiction as it regarded her. The inquisition itself does not charge the act to be done by her voluntarily; and this being essential to the offence, ought to have been *directly* charged. No implication is sufficient. 2 *Hawk.* 354. § 110. Penal laws are to be construed strictly, especially as to the description of the offender; and general words

ought to be so restrained as not to include innocent persons if they can be otherwise satisfied.

The person who is the proper object of the act must be an inhabitant of some state other than New-Jersey. A *feme covert* cannot properly be called an inhabitant of a state. The husband is the inhabitant. By the constitution of New-Jersey, all inhabitants are entitled to vote; but it has never been supposed that a *feme covert* was a legal voter. Single women have been allowed to vote, because the law supposes them to have wills of their own.

The word "*her*" in the last clause of the section may be satisfied by restricting its sense to single women.

If this act be not limited to those acting *sui juris*, it may as well comprehend infants at the breast as *femes covert*.

In the case of *Martin* v. *The Commonwealth of Massachusetts*, 1 *Williams's Mass. Rep.* 390. it was decided that a *feme covert* did not forfeit her lands by joining the enemy with her husband; and the reasoning of the judges in that case applies with equal force to this.

2. If the provisions of this act extend to any *feme covert*, yet they do not extend to one in the situation of Mrs. Kempe; for by the very words of the act, she must not only have "*voluntarily* gone to, taken refuge, or continued with, or endeavoured to continue with, the enemy," but she must also have "*aided* them by counsel or otherwise."

The inquisition does not find that she aided them in any manner. The species of treason intended to be described was that of adhering to the enemies of the country, giving them aid and comfort, as defined by the statute of Edw. III.

It is clear then that Mrs. Kempe was not an offender

against that law, and consequently her estate not forfeitable under it.

But an important point still remains to be decided, viz. what is to be the consequence of this improper construction? are the proceedings merely *erroneous*, or are they *void?* are they good until reversed, or a nullity *ab initio?* If merely erroneous and good until reversed, the judgment of the circuit court must be affirmed. But if the proceedings are void *ab initio*, there has been no judgment, and, consequently, no forfeiture.

This point must be determined by the known principles of the common law. These were ingrafted into the constitution of New-Jersey, and have never been impaired by the legislature, so far as they apply to the ordinary administration of justice.

The tribunal erected to execute these laws was an inferior tribunal, proceeding, by force of particular statutes, out of the course of the common law; it was a jurisdiction limited by the statute, both as to the nature of the offence, and the description of persons over whom it should have cognisance. Every thing ought to have been stated in the proceedings which was necessary to give the court jurisdiction, and to justify the judgment of forfeiture. If the jurisdiction does not appear upon the face of the proceedings, the presumption of law is, that the court had not jurisdiction, and so the cause *coram non judice*. In which case no valid judgment could be rendered.

The proceedings were instituted before a justice of peace upon the information of certain commissioners. The justice issued his warrant to a constable to summon a jury, who take the inquest and return it to the justice, who returns it to the inferior court of common pleas, all of whom are to proceed according to certain forms prescribed by the statute. The inferior court of common pleas has no criminal jurisdiction but what is given by these very statutes relative to treason. And if the proceedings in this

case do not show it to be a case within those statutes, the presumption of law is that the case was not within the cognisance of the court.

But the law itself is founded in manifest injustice. It is clearly *ex post facto*. It makes that act a crime which was innocent when committed; not only innocent when committed, but at that time there was neither constitution nor government to sin against.

There is no presumption in favour of the jurisdiction of a court of limited jurisdiction. 2 *Wils.* 382, 383. 6 *Mod.* 224. 9 *Mod.* 95.

This is a case of conviction under a penal statute; and there is, in point of principle, no difference between this and a conviction before a single magistrate. The cases on this subject fully apply. 4 *Burr.* 2279. *Rex* v. *Corden.* 1 *Burr.* 148. 153. *Rex* v. *Jarvis.* 6 *Term Rep.* 583. 4 *Burr.* 2244. *Cowp.* 26. 29. 2 *Wils.* 382. 2 *Inst.* 231. 12 *Mod.* 355. 1 *Lev.* 160.

The 11th section of the act of December 11, 1778, will be relied on as barring the plaintiff's claim to the land, and compelling her to resort to the treasury for indemnification.

But that section both in words and spirit is applicable only to proceedings and judgments having legal entity and existence, not to proceedings void for want of jurisdiction. It speaks of proceedings by virtue of which *any such sale shall be made*. The sale referred to is a sale in pursuance of, and warranted by, the acts.

The words "*shall hereafter be reversed or made void*," refer to some measure afterwards to be resorted to, to accomplish the reversal of *existing* judgments or proceedings, for error, or irregularity. The term "erroneous" being the appropriate word to describe errors apparent on the record, and

"*void*," to describe *irregularities*. The case of *Parsons* v. *Loyd*, 3 *Wils.* 344. shows that irregular proceedings are called void proceedings. The legislature meant to encourage sales by protecting the purchaser in all cases where the offender was a proper object of the laws. It was foreseen that writs of error or *certiorari* might be brought to reverse those judgments; and that applications might be made to the courts of common pleas to vacate the proceedings for irregularities committed by the justice, or constable, or jury, or the court itself. It interposed this section, but it never meant to give sanction to a proceeding entirely *coram non judice*.

Lewis, contra.

The bill of exceptions prays the opinion of the court upon the whole case. Upon such a prayer the facts ought to be as fully stated as in a special verdict. It presents no question of law. It does not appear that Grace Kempe ever was seised in fee. But if she was, the estate was devested out of her, and vested in the state of New-Jersey.

The proceedings were all perfectly regular, and correspondent with the law.

But even if they were not, the 11th section of the law prevents such error from affecting the title of a *bona fide* purchaser. It declares "That if any process or proceedings, by virtue of which any such sale may be made as aforesaid, shall hereafter be reversed, or *made void*, for error, *or any other cause whatsoever*, such reversal shall not affect, or injure, or be in force, or in any wise operate against *any bona fide purchaser* under this act, but against the state only; and in every such case the plaintiff in error, or person injured by the sale of any estate, shall apply to the legislature to be indemnified out of the public treasury, to the amount of the purchase-money received for such estate."

The title under the sale is good even if the per-

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son whose lands were so condemned and sold were dead at the time of the judgment. Even an innocent third person, whose lands may have been condemned and sold, can never disturb the title of the purchaser; his only remedy is against the state by petition to the legislature.

If the judgment be erroneous, still it is valid until it is reversed; and if reversed, the only remedy is against the state.

It is objected, that the law is *ex post facto*, and contrary to natural justice. Admit it to be so, yet there was nothing to prevent New-Jersey from passing such a law. She was sovereign and independent, and had the power to make what laws she pleased. There was nothing in her constitution to prevent it.

A wife may commit treason in company with her husband. The only exception in cases of treason is, that the wife is not guilty of treason in receiving her husband knowing him to be a traitor.

It is objected that a wife living with her husband cannot be an inhabitant; but there is nothing inconsistent in the idea. The husband and wife are both inhabitants; and it is evident that the legislature meant to include them, because they speak of "his or *her* estate." And the word "*her*" comprehends *femes covert* as well as *femes sole*.

The inquisition does not state it to be a joint offence. If she would avail herself of the objections, she ought to have appeared and traversed the inquisition.

Martin's case, in Massachusetts, was a mere question of escheat. It was a civil case, and it was clear that no woman was comprehended within the terms of the law. The question altogether depended upon the words and intention of the statute of Massachusetts, and not at all upon the

question whether a woman could commit treason in company with her husband.

The court of common pleas of New-Jersey is not limited as to subject matter in common pleas. It is a court of record, and a writ of error lies to its judgment. The cases respecting limited jurisdictions do not apply. It is true, that it has not a general criminal jurisdiction; but in these cases of confiscation it had an unlimited and exclusive jurisdiction. The legislature of New-Jersey had a right to alter the law which required that the jurisdiction should appear upon the face of the inquisition.

If the inquisition be upon a matter within their jurisdiction, it is unimportant whether the defence be defectively set forth.

The defect in setting forth the offence does not affect the jurisdiction of the court.

If the word "*voluntarily*" ought to have been inserted in the inquisition, it is only error of judgment in the court, but it does not deprive the court of its jurisdiction.

Stockton, in reply.

There is no well founded objection to the bill of exceptions; the form of which is warranted, as well by the books as by the practice of New-Jersey. It contains the evidence on both sides, and the point of the charge of the court to the jury, which in such a case, is all that is necessary to bring the whole case fairly before this court.

The neglect of Mrs. Kempe to traverse the inquisition cannot injure her, if the court had no jurisdiction. A person not an object of that law was under no obligation to take notice of the proceeding.

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The estates of third persons, whose lands by mistake were sold, were not forfeited, nor their rights affected. All the sections of the act, which create forfeitures, relate only to the estate of the offender.

The 11th section of the act applies only to cases in which the court having jurisdiction, has proceeded wrongfully, whereby their proceedings might be reversed for error, or declared void for irregularity; not to cases where the court, under colour of the law, proceeded against persons not within it.

February 20.

MARSHALL, Ch. J. delivered the opinion of the court as follows:

In this case two points are made by the plaintiff in error.

1. That the judgment rendered by the court of common pleas, which is supposed to bar the plaintiff's title, is clearly erroneous.

2. That it is an absolute nullity, and is to be entirely disregarded in this suit.

However clear the opinion of the court may be, on the first point, in favour of the plaintiff, it will avail her nothing unless she succeeds upon the second. Without repeating, therefore, those arguments which have been so well urged at the bar, to show that the inquisition in this case did not warrant the judgment which was rendered on it, the court will proceed to inquire whether that judgment, while unreversed, does not bar the plaintiff's title.

The law respecting the proceedings of inferior courts, according to the sense of that term as employed in the English books, has been correctly laid down. The only question is, was the court, in

which this judgment was rendered, "an inferior court," in that sense of the term?

All courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgment may be carried; but they are not therefore inferior courts in the technical sense of those words. They apply to courts of a special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded.

In considering this question, therefore, the constitution and powers of the court, in which this judgment was rendered, must be inspected.

It is understood to be a court of record possessing, in civil cases, a general jurisdiction to any amount, with the exception of suits for real property.

In treason, its jurisdiction is over all who can commit the offence.

The act of the 4th of October, 1776, defines the crime, and that of the 20th of September, 1777, prescribes the punishment. The act of the 18th of April, 1778, describes the mode of trial, and the tribunal by which final judgment shall be rendered. That tribunal is the inferior court of common pleas in each county. Every case of treason, which could arise under the former statutes, is to be finally decided in this court. With respect to treason, then, it is a court of general jurisdiction, so far as respects the property of the accused.

The act of the 11th December, 1778, extends the crime of treason to acts not previously comprehended within the law, but makes no alteration in the tribunal before which this offence is to be tried, and by which final judgment is to be rendered.

This act cannot, it is conceived, be fairly construed to convert the court of common pleas into a court of limited jurisdiction, in cases of treason. It remains the only court capable of trying the offences described by the laws which have been mentioned, and it has jurisdiction over all offences committed under them.

In the particular case of Grace Kempe, the inquest is found in the form prescribed by law, and by persons authorized to find it. The court was constituted according to law; and, if an offence, punishable by the law, had been in fact committed, the accused was amenable to its jurisdiction, so far as respected her property in the state of New-Jersey. The question whether this offence was or was not committed, that is, whether the inquest which is substituted for a verdict on an indictment, did or did not show that the offence had been committed, was a question which the court was competent to decide. The judgment it gave was erroneous, but it is a judgment, and, until reversed, cannot be disregarded.

This case differs from the case from third Institute in this. In that case the court was composed of special commissioners authorized to proceed, not in all cases of treason, but in those cases only in which an indictment had been taken before fifteen commissioners. Their error was not in rendering judgment against a person who was not proved by the indictment to have committed the crime, but who, if guilty, they had no power to try. The proceedings there were clearly *coram non judice*.

It is unnecessary to notice the eleventh section of

the act, since, without resorting to it, this court is of opinion that there is no error in the judgment of the circuit court. *It is affirmed, with costs.*

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THE MARINE INSURANCE COMPANY OF ALEXANDRIA *v.* JAMES YOUNG.

ERROR to the circuit court of the district of Columbia, sitting at Alexandria, in an action of covenant, brought by the defendant in error upon a policy of insurance under the corporate seal of the plaintiffs in error.

The court is not bound to give an opinion to the jury as to the meaning, or construction, of a written deposition read in evidence in the cause.

It is no ground of reversal that the court below refused a new trial which had been moved for on the ground that the verdict was contrary to the evidence.

The point in issue, in the court below, was, whether the insured, on the 11th of December, 1800, when he wrote his order for insurance, had notice of a storm which happened at Jamaica, on the 2d of November, 1800.

Part of the evidence offered to the jury was the deposition of David Young, a witness examined on behalf of the plaintiffs in error. Upon his cross-examination by the defendant in error, at the time of the taking of the deposition, he was asked this question, viz. "On what day in December did you inform the plaintiff that there had been a gale of wind in Jamaica?" To which it was stated in the deposition that he answered, "that on the 13th of December, 1800, he had informed the plaintiff (below) that there had been a strong northern in Jamaica; the circumstance which induced him to mention this, was in consequence of a very heavy gale having happened the day before, and the brig Mary, being then in Hampton Roads, which produced this remark, that he had a blowing voyage out, being compelled to throw over his guns, and that the aforesaid northern had happened when he was in St. Anne's."

After the jury had retired to consider of their

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verdict, they sent a written paper to the judges, requesting to be instructed by the court, whether the above answer of David Young would admit of any other reasonable or legal construction, than that the 13th of December, 1800, was the *first* information given by him to the plaintiff below of the storm of the 2d of November.

But the court refused to give any opinion to the jury upon the construction of the answer of David Young, unless with the assent of both parties; and the counsel for the plaintiffs in error refused to assent, and took a bill of exceptions to the refusal of the court to instruct the jury, without the consent of *both* parties.

The jury found a verdict for the defendant in error; and before judgment, the plaintiffs in error moved the court for a new trial, upon the ground that the verdict was contrary to evidence.

The court having refused to grant a new trial, the counsel for the plaintiffs in error tendered a bill of exceptions, containing what they supposed to be a correct statement of all the evidence offered on the trial, consisting of depositions, and other papers, together with *viva voce* testimony, the substance of which they stated they had taken from their notes. But the court refused to seal the bill of exceptions, unless the counsel for the plaintiff below would agree to a statement of the evidence, the court not being satisfied that the bill of exceptions stated all the evidence offered at the trial. To this refusal of the court to seal the bill of exceptions, the counsel for the plaintiffs in error tendered another bill of exceptions, which the judges sealed.

C. Lee and *E. J. Lee*, for the plaintiffs in error, contended,

1. That the court was bound to give an opinion to the jury, upon the meaning of the witness's answer, and ought to have instructed the jury

that the answer did not necessarily import that the 13th of December, 1800, was the *first time* that the witness mentioned to the defendant in error the storm of the 2d of November; and that if he had given him the information before that day, his answer was so vague that he could not have been convicted of perjury.

2. That the court below ought to have signed the bill of exceptions to their refusal to grant a new trial.

3. That the court ought to have granted a new trial, because the verdict was contrary to evidence; and,

4. That this court, if they believe the evidence is substantially stated in the rejected bill of exceptions, ought to order a new trial.

To support these points, they cited *Co. Litt.* 226. b. 295. b. 1 5. b. *Harg. note.* 1 *Wash.* 389. 2 *Wash.* 275. 9 *Co.* 12. b. 13. a. 3 *Cranch*, 298. 3 *N. Y. Term Rep.* 49. 2 *N. Y. Term Rep.* 330. *Bac. Abr.* 269. *Hen. & Munf. Rep.* 386. 1 *Wash.* 79. 1 *Cranch*, 110. 2 *Cranch*, 126. *Laws U. S. vol.* 1. *p.* 60. § 17. 3 *Bl. Com.* 375.

Swann, contra.

A deposition is merely parol testimony, and the jury is the proper tribunal to judge of the meaning of a witness.

If the witness was not sufficiently explicit, the counsel for the plaintiffs in error, who were present at the examination, ought to have made the witness explain himself more fully. 2 *Term Rep.* 760. *Lloyd* v. *Maund.*

The refusal to grant a new trial, upon the ground that the verdict was against evidence, is not error.

A motion for a new trial on that ground is in the

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nature of a writ of error *coram vobis* for error in fact.

C. Lee and *E. J. Lee*, in reply.

In the case of *Lloyd* v. *Maund*, the court was not called upon to say what was the construction of the letter.

This court is a substitute for the court of appeals of Virginia, as to the cases from Alexandria, and ought to decide as that court would decide in Virginia. By the practice of that state, it is error to refuse a new trial, if a new trial ought to have been granted. The refusal is a part of the proceedings, and appears upon the record.

In the case of *Clarke* v. *Russel*, 3 *Dal.* 415. the court undertook to construe and expound a letter.

LIVINGSTON, J. Can this court reverse for error in fact? Suppose we should be of opinion that the court below ought to have granted a new trial, is it not an error *in fact?*

I have another doubt. Whether it be the ground of a writ of error, if a judge gives or refuses to give an opinion on matter of fact.

A written contract, a bond, note, &c. whatever is the act of the party, is a subject for the construction of the court; but this is not the act of the party, but a mere deposition.

If the court can give the construction of depositions, they may as well try the whole cause when all the evidence consists of depositions.

February 28.

CUSHING, J. delivered the opinion of the court as follows:

This court is of opinion that the inferior court

was not bound to give a construction of the answer of Captain David Young to the second interrogatory of the plaintiff below, as requested by the jury; and that it would be improper in this court to determine whether the inferior court ought or ought not to have granted the motion of the defendants below for a new trial, upon the ground that the verdict was contrary to evidence.

The judgment below is to be affirmed with costs.

BODLEY AND OTHERS *v.* TAYLOR.

ERROR to the district court of the United States, for the district of Kentucky, in a suit in chancery.

In Kentucky, it is a good ground of equitable jurisdiction, that the defendant has obtained a prior patent for land to which the complainant had the better right under the statute respecting lands; and in exercising that jurisdiction the court will decide in conformity with the settled principles of a court of chancery.

Entries of land in Kentucky, must have that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on

Thomas Bodley, James Hughes, Robert Poague and Robert Campbell, citizens of Kentucky, brought their bill in chancery against John Taylor, a citizen of Virginia, in the *state* court for the district of Washington, from whence it was afterwards, by consent, removed into the federal court for the district of Kentucky.

The bill states that on the 17th of October, 1783, Henry Crutcher and John Tibbs made the following entry with the county surveyor, viz. "Henry Crutcher and John Tibbs enters ten thousand acres of land on a treasury warrant No. 18,747. as tenants in common; *beginning* at a large black ash and small buckeye marked thus (I. T.) on the side of a buffalo-road leading from the lower blue licks a north-east course, and about seven miles north-east by east from the said blue licks, a corner of an entry of twenty thousand acres made in the name of John Tibbs, John Clarke, John Sharpe, David Blanchard and Alexander M'Clain, running thence with the said Tibbs & Co.'s line due east sixteen

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hundred poles, thence south one thousand poles, thence west sixteen hundred poles, thence north one thousand poles to the beginning for quantity." That the same having been surveyed, Crutcher assigned his half to Robert Rutherford, to whom and Willoughby Tibbs, (the heir of John Tibbs,) a patent was afterwards granted. Tibbs sold his right to Peyton, who sold a moiety thereof to Magill. Rutherford, Peyton and Magill, sold and conveyed the whole for a valuable consideration to the plaintiffs, by deed dated February 15, 1799.

That the defendant Taylor having, on the 22d of May, 1780, made the following entry with the county surveyor, viz. "John Taylor enters three thousand acres of land upon a treasury warrant adjoining John Walden, on the north side of Johnson's fork of licking, on the east and south-east sides, running up and down said creek, and north for quantity, to include an improvement made by Jacob Drennon and Simon Butler," *has caused the same to be surveyed expressly contrary to location*, and so as to interfere with your orator's claim aforesaid; and *having obtained a patent older than that obtained by the said Rutherford and Tibbs*, notwithstanding he knows his claim is surveyed contrary to location, and although requested, he refuses to convey to the plaintiffs. The prayer of the bill was, that the defendant should convey to the plaintiffs so much of the land included in the defendant's patent as interfered with the plaintiffs' patent; and for general relief.

The defendant by his answer denied the jurisdiction of the court, as a court of equity, because the plaintiffs stated in their bill no equitable ground of relief. He avers his ignorance of the plaintiffs' title, and that he did not know until within a few days then past, the mode in which his own location or survey was made. That he had employed one Ambrose Walden to cause them to be located. He denies all fraud in making his survey. He avers that he was a *boná fide* purchaser for a full and

the adjacent residuum.

If the entry be placed on a road at a certain distance from a given point by which the road passes, the distance is to be computed by the meanders of the road and not by a straight line.

If the entry be of a settlement and pre-emption to a tract of land lying on the east side of a road, the 400 acres allowed for the settlement right must be surveyed entirely on the east side of the road, and in the form of a square.

The call for the *settlement right* is sufficiently certain, but the call for the *pre-emption right* is too vague and must be rejected.

A defendant in equity who has obtained a patent for land not included in his entry, but covered by the complainants' entry, will be decreed to convey it to the complainants, but the complainants will not be required to convey to the de-

valuable consideration, prior to the title claimed by the plaintiffs That no caveat was entered against his survey. That he regularly obtained his patent. That a considerable part of his land has been cleared and settled. That 20 years have elapsed since the entry. That the land-marks and geographical objects which were at that time visible, have been changed, altered or destroyed by time.

defendant the land which they have obtained a patent for, which was covered by the defendant's entry, but which, by mistake, he omitted to survey.

He contends that if he has surveyed and obtained a grant for lands not described in his entry, and which he had no right to survey, he ought not to be compelled to convey them to the plaintiffs, unless they will convey to him what he had a right to survey, and which they have surveyed, and for which they have obtained a patent. That the plaintiffs' entries cover almost all the lands which the defendant could have surveyed under his entry. That by the plaintiffs' delay the defendant has lost the power to locate his warrants elsewhere, if they are improperly located, which he denies.

He states that his entry was dependent on John Walden's, which depended upon Ambrose Walden's, which depended upon Jacob Johnson's. That Jacob Johnson's was first surveyed by the surveyor who surveyed the entries of the Waldens, and of the defendant. That although Jacob Johnson's survey was afterwards suppressed, yet that did not alter the actual location of the two Waldens and of the defendant. That his survey is correctly made according to the laws of Virginia when it was made, and while Kentucky was part of Virginia, and that by the same laws, and the compact between Virginia and Kentucky, at the time of separation, his prior patent, founded upon a prior equity, and obtained without fraud, cannot be vacated.

A survey and connected plat was made under an order of the court, and according to the directions of each party.

A jury came, according to the custom of Ken-

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tucky in chancery suits, and being sworn to inquire of such facts as should be submitted to them, found the following facts, viz. That the place designated on the connected plat by the letter A. is the place called for as the beginning corner of John Tibbs & Co.'s entry of 20,000 acres, dated July 31, 1783, on the buffalo-road leading from the lower blue licks to *Limestone*, which corner is also the beginning of an entry of 10,000 acres made the 17th of October, 1783, in the names of Henry Crutcher and John Tibbs, under which the complainants claim; copies of which entries are annexed to their verdict.

The following facts were agreed by the parties, viz.

2. That the entry of 20,000 acres in the name of John Tibbs and others, and a survey made thereon, for 16,000 acres on the 8th of June, 1796, were assigned to the complainant Bodley, who obtained a patent therefor in his own name dated 21st of April, 1798, and afterwards conveyed one undivided moiety thereof to the complainant Hughes, by deed duly recorded.

3. That the entry of 10,000 acres was made on the 17th of October, 1783, in the name of Henry Crutcher and John Tibbs, surveyed 14th March, 1784, registered 31st December, 1784, and patented in the names of Robert Rutherford, assignee of Henry Crutcher, and Willoughby Tibbs, heir at law of John Tibbs, deceased, 26th August, 1790, was purchased by Bodley 26th September, 1798, and conveyed to all the complainants jointly by deed duly recorded, dated the 15th of February, 1799. That the defendant's survey of 3,000 acres was made on the 1st of September, 1785, registered the 1st of November, 1785, and a patent obtained therefor dated 21st of November, 1786.

4. That the grants issued by the register of the Virginia land-office do not bear regular dates agreeably to the times the surveys were returned, but in

many instances the elder patent has issued on surveys returned several months after surveys on interfering claims were registered.

5. That the surveys of Jacob Johnson's settlement and pre-emption, as stated to have been surveyed in the *defendant's first fact*, (hereafter stated,) were made by the direction of Simon Kenton, his agent, who was also locator of the claims which call to adjoin the said Johnson's surveys, and were never admitted to record.

6. That Ambrose Walden's survey was made on the 29th of November, 1785, John Walden's the 27th of December, 1785, and Jacob Johnson's settlement and pre-emption, as represented on the connected plat by lines thus, (OOO,) was made on the 9th of April, 1789, registered and patents issued thereon to John Reed and Arthur Fox, assignee of Johnson, dated the 20th of February, 1793.

7. That more than one entry and survey has been made on almost all the good land in the state of Kentucky.

8. That the several claims, water-courses, improvements, objects and distances laid down on the connected plat, reported by the surveyor, are truly laid down and reported.

Facts for the defendant.

1. That the settlement and pre-emption of Peter Johnson, heir at law of Jacob Johnson, after being entered with the surveyor, were actually run out and surveyed as designated on the connected plat by the letters and figures M. N. 2 & 3. that the said surveys were made by a surveyor legally qualified to make the same, prior to the dates of the surveys made for Ambrose Walden, John Walden, and the defendant.

2. That the land surveyed for the said Peter

Johnson, upon the said right of pre-emption, there are now 300 acres of cleared land, upon the said survey of Ambrose Walden 200 acres, upon John Walden's 400, and upon the defendant's 300 acres of cleared land.

3. That on the 22d of May, 1780, the land on which the entries of Johnson, Ambrose Walden, John Walden and the defendant, were made, was uncultivated, and the country for fifty or sixty miles on all sides without an inhabitant, except Indians, by whom it was much infested, and only occasionally visited by hunters and land-jobbers.

4. That on the 22d of May, 1780, and prior thereto, there were many cabins, marked trees, hunting camps and improvements then plain and notorious on Johnson's fork, and the other branches of licking, of which there remain now no traces, and which are now wholly incapable of proof as to what was their exact position.

5. That since that time a great change has taken place in the appearance of the country generally round, and at the place where the defendant's entry lies. That the country is now thickly settled, and in high cultivation. That great changes have taken place in the names of streams, roads and other objects, and that few of those who frequented that part of this country in the year 1780, are now alive.

6. That the complainants, Bodley and Hughes, assignees of Tibbs & Co. are the proprietors of the 16,000 adjoining the 10,000 acres in the bill mentioned.

7. That the cabin represented on the connected plat as Jacob Drennon's is the improvement called for in his certificate for a pre-emption, which was claimed for him before the commissioners by Simon Kenton, who also located the complainants' claim of 3,000 acres.

8. That the place designated on the plat, on the south side of Johnson's fork as a cabin, represents a cabin built prior to the first of May, 1780, by Simon Kenton, otherwise called Simon Butler and Jacob Drennon.

It was also agreed between the parties that on and before the 21st of February, 1780, the lower blue licks were generally and notoriously known by the appellations "the blue licks," and "the lower blue licks," and that the road on which the complainants claim their beginning was then generally and notoriously known by the name of the upper road.

That the three buffalo-roads laid down upon the connected plat, in February, 1780, and before, led from the lower blue licks as represented.

That upon any reasonable plan of surveying the defendant's entry of 3,000 acres, it would be covered by the younger entries of 10,000, and 16,000 acres, the property of the plaintiffs, and would include land of equal or better quality than that which it now covers.

That the land in dispute is of more value than 2,000 dollars.

The following are the entries made by the parties respectively, viz.

"January 7th, 1780.

"Peter Johnson, heir at law of Jacob Johnson, deceased, this day claimed a settlement and pre-emption to a tract of land in the district of Kentucky, lying on the east side of the buffalo-road leading from the blue licks to Limestone, nine miles from the lick on the upper road, by the said decedent's raising a crop of corn in the year one thousand, seven hundred and seventy six; satisfactory proof being made to the court, they are of opinion that the said Peter Johnson, &c. has a

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right to a settlement of four hundred acres of land, to include the above locations, and the pre-emption of one thousand acres adjoining; and that a certificate issue accordingly."

"February 21st, 1780.

"Peter Johnson, heir, &c. enters 400 acres in Kentucky, by virtue of a certificate, &c. lying on the east side of the buffalo-road leading from the blue lick to Limestone, nine miles from the lick on the upper road."

"May 22d, 1780.

"Ambrose Walden enters 1,333 acres upon a treasury warrant on the east side of Jacob Johnson's settlement and pre-emption on the waters of Johnson's fork a branch of licking, to include two cabins on the north side of said fork, built by Simon Butler, and to run eastwardly for quantity."

"May 22d, 1780.

"John Walden enters 1,666 2-3 acres upon a treasury warrant, joining the above entry on the south and south-east, to include three cabins built by Simon Kenton, running east and south-east for quantity."

"May 22d, 1780.

"John Taylor enters 3,000 acres upon a treasury warrant joining John Walden on the north side of Johnson's fork of licking, on the east and south-east side running up and down the said creek and north for quantity, to include an improvement made by Jacob Drennon and Simon Butler."

The court below then proceeded to pass the following interlocutory decree:

"It is decreed and ordered that Duvall Payne, of

Mason County, do go on the land in controversy and survey the claim of the complainants, agreeable to their entries. Then survey the settlement entry of Peter Johnson, heir of Jacob, to begin at a point nine miles below the lower blue licks on the buffalo-road as it meanders leading to the mouth of Limestone, thence east so far that a line north two hundred and fifty-three poles will give 400 acres on the east side of the road. That he then run out the pre-emption of Johnson in a square to the cardinal points, to lay around the settlement, and give an equal proportion of land on the south and east which is to direct the lines on the north and west.

"That he survey Ambrose Walden's entry on the east of Johnson's pre-emption, then John Walden's in equal proportions on the south and east of Ambrose, and the defendant's on the south and east of John Walden, in equal proportion.

"That he then ascertain the interference between the claims of the complainants and defendant, which lie without the limits of the defendant's entry as it is now directed to be surveyed; and within the lines of the complainants' entry, mark the lines and make corners to this interference when ascertained, and make report to the next court."

After this interlocutory decree, and before the surveyor made his report, the following facts were agreed and admitted by the parties:

1. "That there is at the blue licks a salt spring on the south side of licking, which is south 36 deg. west 82 poles from another salt spring on the north side of licking."

2. That there are at the blue licks about 500 acres of land trodden and licked away by the resort of buffaloes and other wild beasts.

3. That the connected plat in this cause, and the survey executed in pursuance of the interlocutory

decree, are made out by superficial, that is surface mensuration, and the distance from the blue licks to the respective beginnings of the parties' entries, ascertained in the same way.

Afterwards the surveyor made his report, with a plat stating that he had made the survey according to the decree, and found "*that* part of the defendant's survey which is included within his survey when laid down agreeable to the decree, and is also within the complainants' survey, to be 1,076 acres," "and *that* part of the defendant's survey which is included in the complainants' entry when laid down agreeable to decree, and will not be in the defendant's survey when made agreeable to the decree, is in two tracts, one containing 2,034 acres, and 24 poles," "the other containing 182 1-2 acres."

Whereupon the court decreed and ordered that the defendant should, before the 1st of December then next, convey to the complainants by deed, with warranty against himself and those claiming under him, the two tracts not within his survey as laid down by the order of the court, and which were within the complainants' survey, amounting to 2,216 1-2 acres; and should pay the costs of suit.

Each party brought his writ of error.

The cause was argued at February term, 1806, by the defendant *Taylor*, and *P. B. Key*, for the original defendant, and by the complainant *Hughes*, for the original complainants; and again at February term, 1807, by *H. Clay* and *P. B. Key*, for the original defendant, and by *Hughes* and *H. Marshall*, for the original complainants; and again at this term by *Pope*, for the original complainants, and *P. B. Key*, for the defendant.

Argument for *Taylor*, the original defendant.

The bill discloses no facts which give an equitable jurisdiction to the court. It simply charges that

the defendant (Taylor) *has surveyed contrary to his entry*. It charges no fraud, it alleges nothing to show that a *caveat* would not have given a full, plain, and adequate remedy; and it shows no sufficient reason why the remedy by *caveat* was not pursued.

Virginia borrowed the term *patent*, or *grant*, from the English law, where it means a mode of conveyance by the sovereign power. The land law of Virginia considers it as the consummation of title, and directs the *register* to endorse thereon "*that the grantor hath title.*"

By the compact between Virginia and the inhabitants of Kentucky, in 1789, when Kentucky was erected into an independent state, it is declared (in § 7.) "that all private rights and interests of lands derived from the laws of Virginia, prior to such separation, shall remain valid, and shall be determined by the laws now existing in this state." If therefore the court had equitable jurisdiction in this case, it must have been bestowed by the English or Virginian precedents, and not by the practice in Kentucky since that compact. Kentucky could not, by *law*, affect those rights and interests, and, *à fortiori*, they could not be affected by the *practice of her courts*.

English precedents are therefore admitted to apply; and it is also admitted "that where a *caveat* was entered, or directed to be entered, and a hearing prevented by fraud or accident," the chancery in Virginia exercises jurisdiction; but it is denied that either in England or Virginia, it has ever taken jurisdiction over the simple legality of the title; that it has ever constituted itself into a court of errors to examine whether surveys correspond with entries; or attempted to perpetuate questions in chancery intended by law to be laid at rest by the rapid remedy of a *caveat*. The cases of *White and Jones*, 1 *Wash.* 116. and *Burnsides and Reid*, 2 *Wash.* 48.

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will confirm this doctrine, that fraud destroys, but the absence of it saves, a patent.

In the *allegata*, a survey "contrary to location" is made the only basis of jurisdiction. In the *probata*, the only auxiliary ground which appears, is a certificate of a practice by a register of *Virginia*, given by a register in *Kentucky*, "that a registry is kept of the returns of surveys, but that patents do not issue according to their priority."

Neither such a registry nor such an order in issuing patents are required by law. An act of the register, not required by law, cannot affect the title, and cannot be a ground of jurisdiction.

The jurisdiction rests therefore on the single allegation "that the defendant's survey was made contrary to his location."

The question then is, who has the legal title?

As subordinate to this question it is contended,

1. That the defendant's entry is legal.

This is admitted both by the bill and the answer; 1. By charging the survey to have been made contrary to location; and, 2. By ordering a survey to be made agreeable thereto in the court's opinion. But the legality of the defendant's entry is proved, for the purpose of contrasting it with the illegality of that of the complainants.

The specialty of entries or locations, required by the land law, consisted of *geographical objects*, and not of *geometrical protraction*. The geography ought to be natural, and not artificial; because it was to convey information to those about to locate, upon reading the previous locations at the surveyor's office. It was a previous knowledge of the face of the country to which these locations were to convey a notice. No previous knowledge of chopping

a tree at the time of location could exist. Therefore, a nail driven into a tree, or letters marked on it, could be no notice to locators' reading an account of it at the office, however well informed of the geography of the country. The law did not intend to force them to delay locations, at the risk of losing the land, to go in search of such artificial geography.

A *settlement* is the only species of artificial geography recognised by the law. This being a previous mark in the face of the country, was a notice addressed to a previous knowledge of it. Still rights founded upon this artificial geography were to be established, by the law, within a very short period, to obstruct the inconveniences which might result from making even this very visible, artificial geography the basis of notice.

Johnson's settlement was recognised and established within the limited period. This settlement, although it was artificial geography, yet it was a more notorious and visible object than the two letters cut on a tree. It was a geographical object recognised by law; but the letters were not. Johnson's entry calls for several geographical objects, "the *upper road*," "*leading to Limestone*," "*on its east side.*"

The entries of the Waldens, and of the defendant, by linking themselves to Johnson's, obtained all its specification. If Johnson's was good, the others needed no further precision.

Yet Ambrose Walden's specifies "*Johnson's fork*," and "*two cabins.*" J. Walden's calls for *three cabins.*

That of the defendant specifies "*Johnson's fork*," and "*a cabin*," the site of which is agreed to have been at the place marked on the plat; but which is not on his land as surveyed by the order of the court.

If these entries were good at the time they were made, they never can be adjudged bad afterwards. Time, by defacing the natural geography, and destroying the witnesses to prove it, cannot destroy an entry originally good. We cannot now be obliged to test, by artificial geography, the validity of a survey made according to the natural geography as it existed at the time it was made.

The presumption, arising from a patent, certainly is, that the survey was made according to the entry; and that presumption ought not to be contradicted by less evidence than was in existence at the time the survey was made. At the time Johnson's survey was made, his settlement was in existence. Its actual site cannot now be proved; it is no longer visible. Is not the patent, then, conclusive evidence that his survey was according to his entry?

The *caveat* process is a positive provision against the effects of time. If a caveat could be instituted many years after a patent, after many years' possession, after 1,200 acres had been cleared, 20 years after the entry, 15 after the survey, a new moulded geographical face, and a generation of witnesses dead, it would subject the goodness of entries, intended to be permanent, to unceasing fluctuation. It would be to make titles bad in proportion to the length of possession under those titles.

What is this suit but an attempt to evade the limitation which the law has wisely prescribed for the process of *caveat?* Of what use is a limitation of caveats at law, if caveats in chancery are to be unlimited? Had a caveat been prosecuted in proper time, the actual site of Johnson's plantation and corn field would have been ascertained; and would have controlled the distance of nine miles. But now they make the nine miles control the actual settlement, and attempt, by course and distance, and geometrical protraction, to destroy a survey made originally by geographical objects. If the distance would not *then* have controlled the actual site, it cannot *now*. What was law then, must be the law now.

The *onus probandi* lies on the complainants. They have alleged that the defendant's survey was contrary to his location. In order to support this allegation they must first prove where his entry was, and in order to do that, they must show where was Johnson's *actual* settlement. They must do it absolutely and not hypothetically. The law does not allow that to be a settlement which is to be found only by course and distance.

A presumption of weight enforces the reasonableness of requiring of those who would avail themselves of a geographical object, proof of its site, when they use that site to show in themselves a title to property long held by others. It is, that a survey, made when the site of the object was visible, is more likely to correspond with it, than one made after it is lost. The less probability ought not to overthrow the greater. The first presumption is supported by strong circumstances in addition to the visibility of Johnson's settlement. Why did the defendant take worse land, as it is agreed he did, if he ought to have taken better? Because he was controlled and limited to it by Johnson's real settlement. This construction of his entry, contemporaneous with the existence of the real settlement, contrary to his own interest, strongly enforces the reasonableness of adhering to the law by requiring from those who assail an old title, and long possession, proof more than presumptive.

The presumption arising from the exact admeasurement to fix a site for Johnson, is extremely weak. In claiming his pre-emption, did Johnson measure? or did he compute? The country was then unpopulated, and infested by Indians. If he measured, from whence did he begin? The *lick* consisted of several salt springs, and 500 acres of land were licked and trodden away. Did he pursue the meanders of the road, or proceed in a straight line? By following a conjecture, subject to all those casualties, to fix the site of Johnson, the place may be mistaken. By this mistake the title obtained when that site was

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not matter of conjecture, may be defeated, although the survey may have been made according to the entry.

An old title ought not in this manner to be destroyed by a new speculation, nor the rules of evidence relaxed to defeat a long possession.

Old titles and possession are never overturned, but saved by presumptions. In this case the title is supported by other presumptions arising from the facts stated in the record. The entries call for cabins and other geographical objects, disclosing an intimate knowledge of the country. Kenton, the locator, possessed this knowledge, and directed the surveys whilst the corn field and domicil of Johnson must have been visible. Which is most probable, that Kenton knew where Johnson's actual settlement was, and that he surveyed accordingly? or that Johnson's settlement was the place found by the geometrical conjecture, and that Kenton surveyed contrary to the known location?

But we contend that the defendant's survey does not want the aid of presumption.

The subject of entries and surveys are so connected, that they must be blended in the argument.

It must be understood what a *location is*, before it can be known whether a survey conforms to it.

By the third section of the land law "the party shall direct the location so specially and precisely as that others may be enabled with certainty to locate other warrants on the adjacent residuum." The land law of Virginia consists of two acts of assembly. Each uses the term location; the first explains what is meant by the term in the second. An actual settler was entitled to 400 acres to be surveyed "*including the settlement.*" A settlement is described by the law to consist in "raising a crop of corn," &c. A settlement then was a visible, geographical object, which fixed

the location of the 400 acres. The actual settler had also a right of pre-emption to 1,000 acres to be surveyed "*adjoining* the land allowed for settlement." In the mode of surveying Johnson's right, according to the decree of the court below, there is no proof that the actual settlement is included.

Some latitude is left to the party in surveying his settlement right, under the law.

By appointing judges to decide upon these settlements and pre-emption locations; to keep a record of the "quantities and locations" which they allowed; to give a certificate describing "the particular location;" and to furnish the register and surveyor "with a schedule of such certificates," it is demonstrated that the legislature considered their judgments to be locations; and that these locations were unalterable. They were the acts of judges, not of parties. Johnson's location is a judicial act, and a judicial exposition of the law. Johnson could not alter it. The certificate is directed to be delivered to a surveyor, and upon his receiving it, not a new location, but an entry is allowed "in such way, and upon such terms, as are therein prescribed."

If the court below has such a latitude as to exclude Johnson's settlement from his survey, had not he some latitude to survey so as to include it? The factitious settlement assumed by the court was included in Johnson's first and second surveys, but not in the third made by order of the court.

To affect this a process occurs, under the decree, of a novel kind.

It is assumed that a nine mile point, measured straight, or crooked, is Johnson's settlement. The certificate is construed to mean that not an acre of Johnson's 1,400 shall approach nearer the licks than nine miles, and his plantation or settlement is placed, in the face of the law, and of probability, on an edge of a large tract. By what authority

could the court do this? The only condition of the law is, that the settlement right (*i. e.* the 400 acres) should include the settlement or improvement; and that the pre-emption right, (*i. e.* the 1,000 acres) should adjoin the settlement right. With this restriction only, and that respecting the shape of surveys, (viz. that their breadth should be at least one third of their length,) Johnson had a latitude to survey it as he pleased. How can the court, at this distance of time, deprive him of that right long after he had exercised it.

But after having once exercised it he could not alter it. Can the court now do that for him which he could not have done for himself? and thereby overturn titles dependent upon his location?

In fact, this restriction is only extracted from an incorrect construction of Johnson's certificate.

This certificate consists of two parts; the claim and the judgment.

The court of commissioners received the claims verbally, and the clerk stated them in his own language. Johnson's claim was a settlement right, and to obtain it, he had only to prove where his settlement lay, that the commissioners might describe it, and notify the register and surveyor. The settlement being ascertained, the law locates the land by the references "*include*" and "*adjoin*." All beyond, ascertaining the situation of the settlement, was surplusage, and idle.

This was a *settlement right*, and not a *village right*. This is evident from the certificate itself.

1. Because it mentions the date of the settlement, 1776, and adds the words "before the 1st of January, 1778."

2. It uses the words of the law, applicable to a settlement right, viz. "to *include* the settlement;"

whereas the terms of the law relative to village rights are, "*adjacent*, or convenient to the village."

3. No village is mentioned.

4. It mentions *raising a crop of corn*, which was the proper foundation of a settlement right.

But the decree of the court below turns on the word "*lying*" in the certificate; whether it means a *settlement* "lying" or a settlement *right* "lying" on the east side of the road? Whether Johnson, in using that expression, meant to apply it to the settlement which was the foundation of his claim, or to the thing claimed in consequence of that settlement?

It refers, says the decree, not to the *settlement*, but to the 400 acre settlement *right*, and to the 1,000 acre pre-emption.

If the whole 1,400 acres could be made the object of reference to the word "*lying*," then by declaring that no part of them should approach nearer to some arbitrary point of the 500 acre lick than nine measured miles, Johnson is thrown entirely to the east of the supposed settlement, and the chief part of his, the Waldens', and the defendant's patents transposed to the complainants' 16,000 acre entry.

But if the word "*lying*" refers to "the settlement," then it is obvious that Johnson's survey No. 2. includes the assumed point of settlement with far greater coincidence with the Kentucky precedents; and the survey No. 1. with more still than the survey No. 3. which shoots out an irregular proboscis from the settlement right, to get at the settlement point.

By these precedents, the settlement is placed in the centre of the settlement right, and the settlement right in the centre of the pre-emption right,

surveying from the settlement itself to the cardinal points for quantity.

The law, by saying that the pre-emption right shall *adjoin*, not the settlement itself, but the settlement *right*, countenances the idea that it could not adjoin the actual settlement, because that had been included in the settlement right. But the survey No. 3. makes the pre-emption adjoin the settlement itself.

The decree goes upon the idea that the certificate locates the 400 acre settlement right, and the 1,000 acre pre-emption right on a certain point, on the east side of a road, nine miles from the licks.

But a settlement *right* is not even mentioned or alluded to in the whole certificate, whose only object was to establish the fact that a settlement actually had been made at a certain place, and the number of acres which the settler claimed, or which the commissioners allowed in consequence of such settlement. The right was a legal consequence of establishing the settlement, and could not be located but by locating the site of the settlement. When that site was established, the law located the right.

Some stress is laid upon the words "to include the above location." If the "*above location*" was a location of the whole right, how could the right include the location? This would be to say that a thing may include itself. The thing enclosed must be less than the thing enclosing. Hence it results that the "above location" was not a location of the settlement *right* but of the settlement only.

By allowing the 400 acre tract to include the located settlement on a geographical point located or situated nine miles from the licks, on the east side of the road, and the 1,000 acre tract adjoining the 400 acre tract, and including it, the law is followed correctly, and exactly fulfilled.

To comply with the idea of the decree, great bodies of land must be compressed into a particle at the end of the nine mile line, and then be expanded for surface. If the decree had suffered it to expand equally in every direction from that point, the defendant's title would have been safe. What reason was there to limit this expansion to one particular direction. If the given distance must be violated to gain the required surface, why not expand towards the licks, as well as from them?

But Johnson's second survey has been perfected by acquiescence. There was no complaint, no caveat. Suppose the defendant had surveyed upon the ideal basis of Johnson assumed by the court below, and that universal acquiescence had perfected his title in another place; could he have held his land by a connection with no title of Johnson, whilst a perfect title existed at another place, with which, in his entry, he had connected himself?

If Johnson's and the Waldens' titles are good, the defendant's is good also. Those titles can never be affected by a suit in which they are not parties.

Johnson's entry is 25 years of age, his survey 16, his patent 12; neither has been questioned to this day, by caveat or suit.

But the continuity of the chain from Johnson to the defendant is said to be broken by the want of an "east side" on the buffalo-road, by the want of an "east side" to Johnson's first and second survey, and by want of an "east and south-east sides," by John Walden. There being no such "east sides" Johnson could not lie on the "east side" of the road. A. Walden could not lie on the "east side" of Johnson, nor the defendant on the east and south-east sides of John Walden. Accordingly the decree has provided in the survey No. 3. an "east side" for Johnson, by a north and south line for A. Walden to adjoin, and similar sides for J. Walden and the defendant, violating the positive provision of

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law as to the length and breadth of surveys. But, in the language of these locations, "on the east side" means no more than that the lands are to lie eastward, or on the easterly side or part of. They do not necessarily suppose that the surveys must absolutely have an exact north and south line. It means *aspect*, one part of a body opposed to another part of the same body. In this sense every tract of land must have an east side.

As locators had a very considerable latitude in making their surveys; and as entries might join each other before any of them were actually surveyed, if the principles of the decree are just, and nothing but a north and south line will make an east side, it would put it in the power of the first locator to prevent the second locator from joining him at all, and of course to destroy the validity of his neighbour's entry. This could not be the intention of the law. Kenton used the term "side" with a knowledge of this latitude. He therefore did not intend to use it in a sense which would destroy his locations. He used it merely to show the geographical relation of one entry to another.

Again; these entries call, not for surveys, but for each other. In John Walden's the words "joining the above *entry*" are expressly used. How can the east side of an entry be converted into a north and south line of a subsequent survey. The calls are to couple entries to entries; subsequent entries to previous entries, not previous entries to subsequent surveys.

It is by blending geometry and geography, in considering entries, that inaccurate constructions prevail; whereas the latter only is necessary.

But the complainants' entry is bad in not giving any geographical notice. The letters I. T. cut in the bark of a tree do not constitute a geographical object. A location was required not to enable a man to find his own land, but to enable others to avoid

it. Admit that the complainants can find their beginning, the letters I. T., it does not affect the question whether this artificial geography can be a good location. We may find what we hide, but what we can hide is not a geographical feature in the face of the country. An object taken as the basis of an entry ought to be such as a person acquainted with the country might have known before the entry was made.

The defendant's entry had not been surveyed when the complainants' entry was made. It had not then mistaken its area, as the decree now contends. It was a good entry, as the decree admits. Being good, the title to the land it covered was vested in the defendant, not liable to be re-entered, and not capable of being devested by a younger entry. The younger entry therefore was void as to this vested title. Being void, it could only be made good by a survey and patent. The elder entry, if originally void also, is made good by the same means.

If the defendant has no title, so far as his entry was void, the complainants can have no title so far as theirs was void; or if subsequent events could perfect theirs, the same events could perfect his.

If the complainants have the eldest survey for the lands said by the decree to have been within the defendant's entry, he has the eldest for those said to be within theirs.

The parallel in the cases is complete, but the decree has not seen it. It has given the complainants the land they claim of the defendant, and also that which the defendant has a right to claim upon the same principles.

Is an entry, a survey, or a patent, the basis of a title? The incipient and the final step, the entry and the patent, are for the defendant. The complainants have the eldest *survey* as to the 10,000 acre entry. But neither the survey nor its registry can

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give priority of title. The incipient and the final act being in favour of the defendant, equity will not deprive a fair purchaser of the advantage, in order to do him wrong.

The law directs an endorsation on the patent "that the patentee has title." The decree declares "that his title shall depend on parol testimony for 10, 15, or 20 years."

How far courts of equity are bound by the positive law, is still a question. Whether, with the courts of Virginia, they will stop at the case of fraud or accident having prevented the institution of a *caveat*, followed speedily by an application to equity for relief, or whether they will examine, during 20, 30, or 100 years, every circumstance capable of being examined by *caveats*, is to be the precedent.

The law and equity of the case are so intimately blended, that in discussing the one, much of the other has been anticipated.

Two grounds of equity are set up by the complainants.

1. An irregularity in the defendant's survey. They make no objection to his entry, and by charging the survey with non-conformity, they admit that the entry may be conformed to; they pretend also to show in what manner.

2. That one of their surveys was first made, returned and registered.

The defendant on his side claims equity too:

1. From length of time. Though courts of equity are not bound by acts of limitation, in some cases, they are in others. There must be some ingredient to take a case out of an act of limitation,

after it has fallen within it. The *caveat* process is an act of limitation.

Even in cases most deemed by equity to fall under the strict letter of laws of limitation, courts of equity, in computing a reasonable length of time, will respect such laws as legislative computations founded in reason.

Written testimony is supposed, by the laws of Virginia, to be a reasonable object of confidence, until twenty years have expired. Precedents in chancery have diminished this term to eighteen. Oral testimony maintains its credibility in some cases for five years, in others for a shorter term, and in contests capable of being tried by *caveat*, for six months only. This computation is made upon the particular circumstances inimical to such testimony in every case. These circumstances induced the legislature, in cases of *caveat*, to refuse credibility to oral testimony for more than six months. But the complainants demand it for twenty years.

2. The defendant claims equity from the surveyor's negligence, in not having surveyed with the regularity required by law.

The law is imperative that he should give notices.

Except for this breach of duty in the officer, the defendant would have surveyed and patented before the complainants entered. And a survey and patent could not have been destroyed by a subsequent entry.

Equity considers that as done which ought to have been done. The neglect of the surveyor was a real injury to the defendant, out of which grew not a real injury, but the semblance of an injury to the complainants. If the first neglect had not happened, the case of the complainants would have been just as it now is. If by that neglect they had obtained an unjust advantage over the defendant,

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even a *caveat*, or at least a suit in chancery, would have relieved him. Can they be injured by not obtaining, from this neglect, that which both law and justice would have taken from them? The defendant has in fact the eldest equity as well as the eldest patent.

3. The third ground of the defendant's equity is, that the complainants have gotten better land belonging, as they say, to the defendant, and, therefore, have suffered no injury: that they are bound by their acquiescence; and that it would be unjust to make an exchange now, as it would deprive the defendant of his old patent, and, possibly, involve him in more litigation.

The following cases were cited in behalf of the original defendant, viz.

On the question upon the construction of the entries:

Hughes's Rep. 110. 124. *Kenny* v. *Whitledge.* *Hughes's Rep.* 14, 15. *Pawling* v. *Mereweather.* MS. *Johnson* v. *Naul.* MS. *Jones* v. *Craig.* *Hughes's Rep. Jackson & Owens* v. *Whitaker & Wife, and Ward* v. *Kenton & Fox.* MS. *Speed* v. *Lewis.* MS. *Drake* v. *Rumney.* *Hughes's Rep Ramsay & Logie* v. *Drake.* *Bryant* v. *Owens & Wallace.* *Sneed's Rep.* 9. *Wilson* v. *Speed.* *Id.* 396. *Frazier* v. *Steele.*

And upon the question of jurisdiction: *Hughes's Rep.* 2. 181. 1 *Wash.* 116. 2 *Wash.* 48.

Argument for the original complainants.

All the good lands in Kentucky are subject to at least two contending entries. In this case Taylor had the first entry, but Bodley had the first survey.

As to the question of jurisdiction, it has been long settled as a good ground of equity that the de-

fendant had obtained a legal title to which the plaintiff had a prior or better equity; and a court of law could not sustain an equitable against a legal title.

If the plaintiff shows an equitable title, the defendant must not only show his legal title, but he must support it by an equity equal at least to that of the plaintiff; for in equity the legal estate stands for nothing. *Sneed's Rep.* 43. 46, 47. *Quarles* v. *Brown.* *Consella* v. *Briscow.* *Swearingen* v. *Briscow.* 1 *Wash.* 230. *Hughes's Rep* 53. *Fry* v. *Ezra.* *Id.* 88. 92. *Smith* v. *Evans*, *Id.* 110. *Greenup* v. *Coburn.* *Sneed's Rep.* 32. *South* v. *Bowles.* *Id.* 52. *Bradford* v. *Allen.* *Id.* 130. *Bruce* v. ——.

Taylor might have had a remedy by *caveat* if he would. But the remedy by caveat is only a concurrent remedy. It is not a remedy which can apply to all cases. A man may not know of a survey in time to enter his caveat.

The neglect of the process by caveat is no bar to relief in equity. *Harwood* v. *Gibbons*, MS. *Myers* v. *Speed*, *Hughes's Rep.* 97. *Kenton* v. *M'Connell*, *Hughes's Rep.* 140. *Picket* v. *Bib*, MS.

If the court has jurisdiction, the next question is, whether the complainants' entry is legal and sufficiently certain.

Two questions arise respecting every entry: 1. Is it sufficiently specific? 2. Is the same land surveyed which is described in the entry?

It is sufficiently specific if the land can be found by a reasonable search. At the time of the complainants' entry, nothing was more notorious in Kentucky than a *lick* and a *buffalo-road.* There is a difference where a distance is mentioned only to lead you to a part of the country where you will find a specific object which is described as the be-

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ginning of a tract; and where the beginning is at the end of a particular line.

There must always be a general description, and a particular description.

It was not necessary that the marked trees should be notorious. You would be led to them by a reference to notorious objects, the blue licks, and the buffalo-*road. Greenup* v. *Coburn*, *Hughes's Rep.* 104. *Carter* v. ——, *Hughes's Rep.* 182. *Johnson* v. *Brown*, *Hughes's Rep.* 60. *Sneed's Rep.* 105.

If the complainants' entry be sufficiently certain, the next question is as to that of the defendant.

The defendant's entry depends upon John Walden's, which depends upon Ambrose Walden's, which depends upon Peter Johnson's. If Peter Johnson's be uncertain, the rest are uncertain.

Peter Johnson's 400 acres, being his settlement right, were to lie on the east side of the upper buffalo-road, and nine miles from the licks.

The beginning of the tract was to be nine miles from the lick, not the middle of the tract. The question then is, how is the survey to be made? Are you to follow the meanders of the road to ascertain the nine miles, or to take a point nine miles distant from the lick on a straight line? Are you to follow the road in running the lines of the survey? It would be impossible to be accurate as to the meanders of the road. The buffaloes make generally a number of paths not parallel to each other, sometimes approaching and again diverging, sometimes occupying a broad space which is all called the road; and they often meander so much, that after travelling nine miles you may not be a mile distant from the place of beginning. A distance upon a water-course is always measured in a straight line, without regard to the meanders of the

stream. So we say it ought to be understood when speaking of a buffalo-road.

The whole of Peter Johnson's 1,400 acres were to lie on the *east* side of the road; but the claimant below has placed part of it on the west side.

The proper mode of surveying Peter Johnson's claim is to begin at the end of nine miles upon a straight line, and so make the whole survey on the east side of the road in the form of a square, making the general course of the road the base line of the survey.

But Ambrose Walden's land could not be bounded by a mere right of pre-emption, which was undefined, unlocated, and might never be carried into effect. It was a mere possibility. There must be an entry of a pre-emption before it can be considered as located, and until it be located it cannot be surveyed. *Porter* v. *Gass*, *Sneed's Rep.* The case of *Kenny* v. *Whitledge* applies only to *village* rights. *Patrick* v. *Woods*, *Hughes's Rep.* *Sneed's Rep.* 330. 336. 270.

If it could not adjoin the pre-emption right, neither could it adjoin the *settlement right*, because the call was to join the 1,400 acre tract claimed by Peter Johnson, and not his 400 acre tract.

The defendant has lost his right to the land contained in his entry, by making his survey contrary to his location. When the survey is made, although erroneously, it is an execution of the warant, and puts an end to the entry as such. The warrant, as well as the entry, is *functus officio*.

In these cases a court of chancery does not act upon equitable principles only, but is merely to decide which party has the legal right to the patent. It is only a chancery form of deciding a legal right. The court cannot require the complainants to give up to the defendant the land which the de-

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fendant might have surveyed under his entry, but which he failed to survey in proper time. It is not true in principle that the defendant is entitled to get his land somewhere; he did not purchase with that understanding. The state did not so contract.

When a man surveys contrary to his location he loses his equity. These are statutory rights, and therefore to be decided strictly according to the statute. An entry is a legal right; it descends to heirs; it is subject to execution; it may be sold and transferred. These points have all been decided by the courts of Kentucky.

P. B. Key, in reply.

There cannot be two valid entries of the same land at the same time.

When a first entry is forfeited the land is again waste and unappropriated; and not till then can a second entry of the same land be valid. A second entry made while the first was valid is void.

If Taylor's entry was valid, it gave a legal right, descendible, &c. The land was no longer waste and unappropriated or vacant. The entry of the complainants, while Taylor's entry was in force, was a nullity, and gave them no right either at law or in equity.

February 27th, 1807.

MARSHALL, Ch. J. The court has been able to form an opinion as to a part only of this case.

That the court as a court of chancery has jurisdiction of such cases, is a point established by a long course of practice in Virginia and in Kentucky; but in the exercise of that jurisdiction, it will proceed according to the principles of equity. In such case, a prior entry will be considered as notice to him

who has the legal title, if such entry be sufficiently certain. And the legal title will be considered as holden for him who has the prior equity.

March 14*th*, 1809.

MARSHALL, Ch. J. delivered the opinion of the court as follows:

This is an appeal from a decree of the court for the district of Kentucky, by which Taylor was directed to convey to Bodley and others a part of a tract of land to which he held an elder patent, but to which Bodley and others claim the better right under a junior patent. The judge of the district court having directed such part of the land held by Taylor to be conveyed to Bodley and others, as appeared by certain rules, which he has applied to the case, to be within their claim, and not within Taylor's location, and having dismissed their bill as to the residue, each party has appealed from his decree.

Previous to any discussion of the rights of the parties, it has become necessary to dispose of a preliminary question.

The defendant in the court below objects to the jurisdiction of a court of equity, and contends not only that the present case furnishes no ground of jurisdiction, upon general principles, but that the land law under which both titles originate, in giving a remedy by which rights under entries might be decided previous to the emanation of a patent, has prohibited an examination of the same question after a patent shall have issued.

Had this been a case of the first impression, some contrariety of opinion would perhaps have existed on this point. But it has been sufficiently shown that the practice of resorting to a court of chancery in order to set up an equitable against the legal title, received, in its origin, the sanction of the court of ap-

peals, while Kentucky remained a part of Virginia, and has been so confirmed by an uninterrupted series of decisions as to be incorporated into their system, and to be taken into view in the consideration of every title to lands in that country. Such a principle cannot now be shaken.

But it is an inquiry of vast importance whether, in deciding claims of this description, a court of equity acts upon its known, established and general principles, or is merely substituted for a court of law, with power to decide questions respecting rights under the statute, as they existed previous to the consummation of those rights by patent.

It has been argued that the right acquired by an entry is a legal right, because it is given by a statute, that it is the statutory inception of a legal title which gives to the person making it a right, against every person not having a prior entry, to obtain a patent and to hold the land. The inference drawn from this is, that as the law affords no remedy against a person who has defeated this right by improperly obtaining a prior patent, a court of chancery, which can afford it, ought to consider itself as sitting in the character of a court of law, and ought to decide those questions as a court of law would decide them, if capable of looking beyond the patent.

This reasoning would perhaps be conclusive if a court of chancery was, by statute, substituted in the place of a court of law, with an express grant of jurisdiction in the case. But the jurisdiction exercised by a court of chancery is not granted by statute; it is assumed by itself: and what can justify that assumption but the opinion that cases of this description come within the sphere of its general action? In all cases in which a court of equity takes jurisdiction, it will exercise that jurisdiction upon its own principles. It is believed that no exception to this rule is to be found in the books, and the state of land titles in Kentucky is not believed to furnish one. The true ground of the jurisdic-

tion of a court of equity is, that an entry is considered as a record of which a subsequent locator may have notice, and therefore must be presumed to have it; consequently, although he may obtain the first patent, he is liable, in equity, to the rules which apply to a subsequent purchaser with notice of a prior equitable right. This certainly brings the validity of the entries before the court, but it also brings with that question every other which defeats the equity of the plaintiff.

The court, therefore, will entertain jurisdiction of the cause, but will exercise that jurisdiction in conformity with the settled principles of a court of chancery. It will afford a remedy which a court of law cannot afford, but since that remedy is not given by statute, it will be applied by this court as the principles of equity require its application.

Neither is the compact between Virginia and Kentucky considered as affecting this case.

If the same measure of justice be meted to the citizens of each state, if laws be neither made nor expounded for the purpose of depriving those who are protected by that compact, of their rights, no violation of that compact is perceived.

The court will proceed, then, to inquire into the rights of the parties, and, in making this inquiry, will pay great respect to all those principles which appear to be well established in the state in which the lands in controversy lie.

Taylor holding the eldest patent, it is necessary that the complainants below should found their title on a good entry. The validity of their entry, therefore, is the first subject of examination.

It was made on the 17th of October, 1783, and is in these words; "Henry Crutcher and John Tibbs enter 10,000 acres of land on a treasury warrant, beginning at a large black ash and small buckeye marked thus, I. T. on the side of a buffalo-

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road leading from the lower blue licks a N. E. course, and about seven miles N. E. by E. from the said blue licks," &c.

The only objection to this entry is, that the beginning is uncertain.

Were the validity of this objection to be admitted, it would shake almost every title in Kentucky. If it be recollected that almost every acre of good land in that state was located at a time when only a few individuals, collected in scattered forts or villages, encroached on the rights of the savages and wild beasts of the country, that neither these sparse settlers, nor those hardy adventurers who travelled thither in quest of lands, could venture out to explore the country, without exposing their lives to imminent hazard, that many of those who had thus explored the country, and who made locations, were unlettered men, not only incapable of expounding the laws, but some of them incapable of reading, it is not wonderful that the courts of Kentucky should have relaxed, in some degree, the rigour of the rule requiring an impracticable precision in making entries, should have laid hold of every circumstance which might afford that certainty which the law has required, and should be content with that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on the adjacent residuum.

The entry of Crutcher and Tibbs possesses this reasonable certainty.

The blue licks was a place of general notoriety, and there appears to have been no difficulty in ascertaining the point from which the mensuration should commence. There being only one of the three roads leading from that point, which ran nearly a N. E. course, no subsequent locator could doubt on which road this land was placed. The entry having called for visible objects on the road about

seven miles from the licks, those visible objects might be discovered without any extraordinary exertion; and if they could not be discovered, then that call, according to the course of decisions in Kentucky, would be discarded, and about seven miles would be considered as seven miles. But those objects remained, and it appears that no difficulty has arisen, or ought to arise, on this point. The jury have found it to be the beginning called for in the entry.

The entry, therefore, of Crutcher and Tibbs is sufficiently certain, and the court will proceed to examine the entry and survey of Taylor.

This entry being the last link of a chain commencing with Jacob Johnson, it is necessary to fix Jacob Johnson, in order to ascertain the position of Taylor.

Jacob Johnson's title is a settlement and pre-emption; a certificate for which was granted by the commissioners, on the 7th day of January, 1780, in the following terms.

Peter Johnson, heir at law of Jacob Johnson, deceased, this day claimed a settlement and pre-emption to a tract of land in the district of Kentucky, lying on the east side of the buffalo-road leading from the blue licks to *Limestone*, nine miles from the lick on the upper road, by the said decedent's raising a crop of corn in the year 1776. Satisfactory proof being made to the court, they are of opinion that the said Peter Johnson, &c. has a right to a settlement of 400 acres of land to include the above location, and the pre-emption of 1,000 acres adjoining, and that a certificate issue accordingly.

On the 21st of February, 1780, this certificate, so far as respected the settlement of 400 acres, was entered with the surveyor.

It is the opinion of the court that the 400 acres

of land should lie entirely on the east side of the road, that it should begin at the distance of nine miles, and that those miles should be computed not by a straight line, but according to the meanders of the road.

In this respect the court perceives a clear distinction between a call for one place by its distance from another, if the intermediate space be entirely woods, or if a stream, which cannot well be followed, passes from the one to the other, and where a road is called for, which conducts individuals from point to point. The distance of places from each other is not generally computed by a stream not navigable, but is always computed by a road which is travelled. It is, therefore, the opinion of the court that where, as in this case, there is no other call in the entry showing a contrary intent, and the entry is placed on a road at a certain distance from a given point by which the road passes, the distance is to be computed by the meanders of the road, and not by a straight line.

The beginning of Johnson's settlement being found, and its western side being placed along the road, the next inquiry is, in what manner the land is to be surveyed.

In order to give certainty to locations of this description, the courts of Kentucky have uniformly determined that they shall be understood as being made in a square. Johnson's line upon the road, therefore, must extend along the road until two lines at right angles from each end of this base shall, with a third line parallel to the general course of the road, include, in a figure which, if the road be reduced to a straight line, would make a square, the quantity of 400 acres on the east side of the road.

The next link in this chain of entries, on which the title of Taylor depends, is Ambrose Walden's.

On the 22d of May, 1780, Ambrose Walden en-

tered 1,333 acres on the east side of Jacob Johnson's settlement and pre-emption, on the waters of Johnson's fork, a branch of licking, to include two cabins on the north side of said fork, built by Simon Butler, and to run eastwardly for quantity.

The cabins, it is said, cannot be found; or, if found, cannot be distinguished. The waters of Johnson's fork would be too vague, and, therefore, the validity of this entry must depend on the call for Johnson's settlement and pre-emption.

This is said to be insufficient, because the pre-emption had not, at that time, been located with the surveyor, and the certificate of the commissioners was no location. Johnson's pre-emption, therefore, had, on the 22d of May, 1780, no locality, a subsequent entry could not depend upon it; for it might be placed in any situation, or in any form, provided it be so placed as to adjoin his settlement in any point.

The argument with respect to the pre-emption appears to the court to be conclusive. This pre-emption right certainly had no locality on the 22d of May, 1780, and an entry made to depend entirely on it would have been too vague, too uncertain, to be maintained. But it does not follow that the entry of Ambrose Walden is void. He does not call singly for the pre-emption, he calls for "the east side of Johnson's settlement and pre-emption right;" and it seems to the court that a fair application of the principles which have governed in Kentucky in similar cases, will maintain this location.

The settlement was actually located; the pre-emption, at the time, had no other than a potential existence; and the uniform course of decisions appears to have been to discard one call which is either impossible or uncertain, and to support the entry, if there be other calls which are sufficiently certain. The decisions have gone so far as to dismiss a part of the description of a single call, if other terms of

description be sufficient to ascertain the thing called for. Now the call for the settlement right is valid and certain; and the court is not of opinion that this certainty is rendered uncertain by being united to the call for a pre-emption which had no real existence.

The call appears to be substantially the same as if it had been for the land of Johnson. His settlement and pre-emption was perhaps the name which, in common parlance, designated this land even before the location of the pre-emption, because it was appendant to the settlement. It has been decided that a call for the land would be good, and the court thinks that decision applicable to this case.

Against this has been urged the doubt which a subsequent locator would have entertained at the time, whether Johnson might not have been permitted to locate his pre-emption on any land adjoining his settlement, and whether Walden's entry calling for that pre-emption might be decided to be good, and to be placed so as to bind upon it. This doubt, it is said, though now removed, then existed, and would have operated on the mind of the subsequent locator.

The force of this argument will not be denied. But it must also be admitted that it applies with equal strength to the course of artificial reasoning which has governed the decisions of the courts of Kentucky, and on which the titles of the people of that country depend. Subsequent locators must have doubted in what manner any of these questions would be decided. But having been decided, the certainty which they have introduced is carried back to the time when the location was made, and affirms that location.

It has also been said that it is uncertain which side of Johnson's settlement is the east side, and that, in point of fact, the upper side, or that furthest

from the blue licks, faces the east more nearly than any other.

However this fact may be, the court is of opinion that the terms of Johnson's entry designate his east side. His settlement is to lie on the east side of the road. The road, then, in contemplation of the locator, forms the west side, and the side opposite the road must be the east side. The entry must have been so understood by all subsequent locators, and when they call for his east side, the intention to place themselves on the side opposite the road is sufficiently intelligible.

In this, as in other difficulties which occur in the course of the inquiry, it is material to observe that the bill does not charge Taylor's entry to be void for uncertainty. On the contrary it impliedly admits the certainty of his location, and charges that his survey does not conform to it. The real question, then, is not whether Taylor shall be surveyed at all, but where he shall be placed.

The entry of Ambrose Walden, then, will lie on the east side of Johnson's settlement, that is, on the side opposite the road; and, this point being established, the manner in which his land is to be surveyed is free from further doubt. It is to be laid off in a square, the centre of the base line of which is to be the centre of the south-eastern line of Johnson's settlement.

The next entry to be considered is that of John Walden. He enters 1,666 2-3 acres joining Ambrose Walden, on the south and south-east, and to run east and south-east for quantity.

Although Ambrose Walden has no south side, yet it is sufficiently apparent that his south-west side was intended by the locator. The difficulty arises from the subsequent call of the entry to run east and south-east for quantity. A line drawn east from Ambrose Walden's south-western corner would pass

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through the middle of his land, and a line drawn south-east from the same corner would pass either through or so near his land as to make it almost impossible to suppose that the locator could have intended to make so long and narrow a triangle. The reasonable partiality of Kentucky for rectangular figures must, therefore, decide the shape of John Walden's land, and regulate the manner in which this call of his entry is to be understood. Ambrose Walden's north-western line must be extended to the south, and a line must be drawn due east from his eastern corner, so that a line parallel to his south-eastern line intersecting a line drawn south-east from the extremity of the north-western line of Ambrose Walden continued shall lay off 1,666 2-3 acres of land in equal quantities on the northern and south-eastern sides of Ambrose.

It is not to be disguised that there is much difficulty in placing John Walden, but the court can perceive no mode of placing him more conformable to the principles which prevail in Kentucky than that which it has adopted.

We are now brought to Taylor's entry.

On the 22d of May, 1780, John Taylor enters 3,000 acres adjoining John Walden on the north side of Johnson's fork of licking, on the east and south-east side, running up and down said creek, and north for quantity, to include an improvement made by Jacob Drennon and Simon Butler.

There is to John Walden's land no east side, nor any side so nearly east as the south-east side. The word side, being in the singular number, and the same side answering, better than any other, both parts of the description, the land must lie on the south-east side.

It is also thought to be the more reasonable construction of the entry that the words, on the north side of Johnson's fork, refer to the situation of

John Walden's land, not to the location of Taylor's. But this is probably not important in the case. Taylor is to lie on the south-east of Walden, to include an improvement made by Drennon and Butler, to run up and down the creek, and north for quantity.

With these calls, it would have been the opinion of the court that Taylor could not cross the creek, had not his entry called for an object on the south side of the creek. That object is the improvement made by Jacob Drennon and Simon Butler.

It has been said that the country was covered with cabins, and that therefore this call was no designation of the land that was located. This argument is correct so far as it is urged to prove that this would not be sufficient, as a general description, to enable subsequent locators to say in what part of the country this entry was made. Neither would the letters I. T. marked on a tree answer this purpose. But, when brought into the neighbourhood by other parts of the description, these letters serve to ascertain the beginning of the entry under which the claim adversary to that of Taylor is supported. So Taylor informs subsequent locators of the neighbourhood in which his land lies, by calling for the south-east side of John Walden's entry, on the north of Johnson's fork, which is found by a reference to other entries which commence at a point of public notoriety. When brought to the south-east side of John Walden, he is near the cabin called for, and it does not appear that there was, in the neighbourhood, any other cabin which this entry could possibly be understood to include. This part of the description, then, will carry Taylor to the south side of Johnson's fork, and, if permitted to cross that fork, the favourite figure of the square must be resorted to. Against this it is said that, in such a case, the rule of Kentucky will carry him no further than barely to include the object of his call. But this rule cannot apply to this case, because it would give a survey the breadth of which would not be one third of its length.

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It is impossible to look at the general plat returned in this case without feeling a conviction that the surveyor considered that fork which, in the plat, is termed mud lick fork, as Johnson's fork; and there is no testimony in the cause which shows that, when this location was made, that middle stream which runs through Taylor's survey was denominated Johnson's fork. The finding of the jury, however, that the roads and water-courses are rightly laid down, must induce the opinion that this fact was proved to them.

In a case where the mistake is so obvious, the rule which, under circumstances so doubtful, relative to place, deprives the person, in surveying whose property the mistake has been made, of his legal title, appears to be a severe rule to be adopted in a court of equity. But such is the situation of land titles in Kentucky, that the rule must be inflexible.

Taylor, then, must adjoin John Walden on his south-east side, where that line crosses Johnson's fork, if it does cross it, and if it does not, then at its south-eastern extremity, which will be nearest Johnson's fork. If a square formed upon the whole line shall contain less than three thousand acres, then two lines are to be extended due north until, with a line running east and west, the quantity of three thousand acres shall be contained in the whole figure. If such a square shall contain more than three thousand acres, then it is to be laid off on so much of Walden's line as to contain the exact quantity.

This being the manner in which it appears to the court that Taylor's entry ought to be surveyed, it remains to inquire whether, under the principles which govern a court of equity in affording its aid to an equitable against a legal title, the complainants below ought to recover any, and, if any, what part of the lands surveyed by Taylor, and, if any, what terms are to be imposed upon them.

The entry as well as patent of Taylor is prior to that under which the complainants in the district court assert their title. Of the entries made within their location, therefore, they had that implied notice which gives a court of equity jurisdiction of this cause. They cannot object to the operation of a principle which enables them to come into court. But, in addition to this principle, they must be considered as having notice, in fact, of these locations. The position of the entries of both plaintiffs and defendant is ascertained by calling for certain distances along the same road from the same object. Crutcher and Tibbs, therefore, when they made their location, knew well that they included the Waldens and Taylor, and that their entry could give them no pretensions to the lands previously entered by those persons. If, by any inadvertence, the Waldens and Taylor have surveyed land to which Crutcher and Tibbs were entitled, and have left to Crutcher and Tibbs land to which the Waldens and Taylor were entitled, it would seem to the court to furnish no equity to Crutcher and Tibbs against the legal title which is held by their adversaries, unless they will submit to the condition of restoring the lands they have gained by the inadvertence of which they complain.

The court does not liken this inadvertent survey of lands, not within the location, to withdrawing of the warrant and re-entering it in another place. The latter is the act of the mind intentionally abandoning an entry once made: the former is no act of the mind, and so far from evidencing an intention to abandon, discovers an intention to adhere to the appropriation once made. Although their legal effect may be the same, yet they are not the same with a person who has gained by the inadvertence, and applies to a court of equity to increase that gain.

Was this, then, a case of the first impression, the court would strongly incline to the opinion

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that Bodley and Hughes ought not to receive a conveyance for the lands within Taylor's survey, and not within his entry, but on the condition of their consenting to convey to him the lands they hold which were within his entry and are not included in his survey. But this is not a case of the first impression. The court is compelled to believe that the principle is really settled in a manner different from that which this court would deem correct. It is impossible to say how many titles might be shaken by shaking the principle. The very extraordinary state of land title in that country has compelled its judges, in a series of decisions, to rear up an artificial pile from which no piece can be taken, by hands not intimately acquainted with the building, without endangering the structure, and producing a mischief to those holding under it, the extent of which may not be perceived. The rule as adopted must be pursued.

Taylor, then, must be surveyed according to the principles laid down in this decree, and must convey to the plaintiffs below the lands lying within his patent and theirs, which were not within his entry.

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The first survey, under a military land warrant in Virginia, gives the prior equity. The survey is the act of appropriation.

The certificate of survey is sufficient evidence that the warrant was in the hands of the surveyor.

ERROR to the district court for the Kentucky district, in a suit in chancery, wherein Taylor and Quarles were complainants against Brown. The bill of the complainants was dismissed by the court below.

Both parties claimed under military warrants upon the king's proclamation, for services rendered prior to the year 1763.

The complainants claimed under a warrant in favour of *Angus M'Donald*, for 2,000 acres issued

the 5th of February, 1774. The defendant claimed under a warrant in favour of *Jethro Sumner*, for 2,000 acres, issued the 3d of December, 1773. M'Donald's survey was made on the 7th of July, 1774. Sumner's was made on the 24th of June, 1775, and he obtained a patent on the 5th of January, 1780. The patent upon M'Donald's survey, was not issued until the 10th of January, 1792; so that the complainants had a younger warrant and patent, but the elder survey. The defendant had the elder warrant and patent, but the younger survey. M'Donald's survey included 3,025 acres; Sumner's included, 2,576 acres. The quantity covered by both surveys was 1,080 acres, of which Taylor claimed 660, and Quarles, 200; it did not appear who claimed the other 220 acres, included in the interference.

M'Donald's survey was made by Hancock Taylor, an assistant surveyor of Fincastle county, where the lands lay, who, before his return to the office, was killed by the Indians on the last of July, 1774, but his field-books and papers were preserved by his attendants, and delivered to the principal surveyor of the county, in September, 1774, who made out a plat therefrom.

The complainants' bill charges, that the survey of Sumner was *fraudulently* made, so as to interfere with M'Donald's. The answer denies the fraud; and there was no evidence of fraud, or even of notice on the part of Sumner.

P. B. Key and *Rowan*, for the complainants, (the plaintiffs in error,) contended, that the survey made by Hancock Taylor, and the plat and certificate of survey made out by the principal surveyor, were a good execution of the warrant, and were a complete appropriation of the land surveyed, so as to give to M'Donald a prior title in equity; and that the subsequent patent related back to the survey, so as to give to the complainants a better title in equity than the defendants.

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That clause of the land law of Virginia, which requires every survey to be recorded within two months after it is made, is merely *directory* to the surveyor; and his neglect to record it does not invalidate the survey.

It is not necessary that the deputy surveyor who made the survey, should make out the plat and certify it. It may be done from his notes, by the principal surveyor.

A subsequent locator of land in Virginia, without notice of the prior location, cannot protect himself by obtaining the elder patent.

A survey is not void because it includes more land than was directed to be surveyed by the warrant.

The patent relates to the inception of title; and therefore, in a court of equity, the person who has first appropriated the land has the best title, un-

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Pope and *Swann*, contra, contended,

1. That it did not appear that M'Donald's warrant ever was in the hands of the surveyor.

fess his equity is impaired by the circumstances of the case

2. That the survey was not recorded within two months after it was made.

The locator of a warrant undertakes himself to find *waste* and *unappropriated* land, and his patent issues upon his own information to the government, and at his own risk. He cannot be considered as a purchaser without notice.

3. That the survey was not certified by Hancock Taylor, the assistant surveyor who made the survey.

4. That the complainants had a remedy by *caveat;* and having neglected to avail themselves of that remedy, they could not have relief in equity.

5. That the survey, both in law and equity, was void as to all but 2,000 acres.

6. That the complainants have no equity.

The equity of the prior locator extends to the surplus land surveyed, as well as to the quantity mentioned in the warrant.

1. Upon the first point it was said that the warrant is the only authority for the officer to survey the land; and if he never had the warrant, the whole proceeding is void. It must be proved, therefore, that the officer had the warrant.

2. The act of 1778, *c.* 14. § 6. requires that every survey shall be recorded by the surveyor, in a book kept by him for that purpose, within two months after the same shall be made. This was a condition precedent to the validity of the survey.

3. The survey was not certified by Hancock Taylor, the assistant surveyor who made the survey.

It is an incontrovertible position, that when the law entrusts an officer to do an act *in pais*, he is the only person who can certify the act done. A deputy surveyor, or a deputy sheriff does not derive his authority from the principal surveyor, or the high sheriff, but from the law. The principal has only the appointment of the deputy; but his

authority to act as, and for the principal, is derived from the law. There can be no evidence of a survey, but the certificate of the officer who made it. If a man went to make a settlement, but should be killed on the way, it is true, the act of God prevented, but still it was no settlement.

4. The complainants had a remedy by *caveat*, when they might have established their title at law. Having lost this remedy by their own negligence, it is contrary to the principles of equity to aid them.

5. The survey was void as to the surplus, beyond the 2,000 acres authorized by the warrant. As to this surplus M'Donald was a mere volunteer; he paid no consideration; it was a fraud upon the state; and a mere survey, without the authority of a warrant, can give no title in equity. *Hughes's Rep.* 21. 26. *Dougherty* v. *Crow.* *Sneed's Kentucky Cases*, 9. *Ward* v. *Kenton.* *Sugd.* 200, 201, 202. 1 *Fonb.* 348.

6. The complainants have no equity. The defendant was a purchaser for a valuable consideration without notice of any title or claim by M'Donald. No fraud or notice is brought home to Sumner. He purchased the land fairly; he has paid for it and obtained the legal title; and he must hold it until some other person shows a better title in equity.

There is no evidence of notice, even if the depositions can be read which are sent up with the record; of which there is strong doubt; for the jury, according to the practice in Kentucky, has found all the facts in dispute between the parties.

Even if one of the depositions should contradict the answer, yet a court of equity will never decree against the defendant's answer, upon a single deposition, unless it be strongly corroborated by circumstances.

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[LIVINGSTON, J. Are those the depositions upon which the jury acted in finding the facts? If they are, I, for myself, should consider the finding conclusive; and that we could not look into the depositions.

MARSHALL, Ch. J. When the first case of a suit in chancery of this kind came before this court from Kentucky, the court was struck with the irregularity of the intervention of a jury to ascertain the facts in any other mode than by an issue directed by the court as a court of chancery; and as this court is only authorized to proceed in chancery cases according to the principles and usages of courts of equity, the court was disposed to disregard facts thus found.

The court felt no difficulty in looking into the depositions, but their doubt was, whether they should take into consideration the facts found. However, as such a practice was said to have been established in Kentucky, the court agreed to look into the facts found where they were not inconsistent with the depositions in the cause. I think the first case of this kind which came up from Kentucky was that of *Taylor and Bodley.*]

If M'Donald ever had equity, he has forfeited it by his negligence. No step was taken to complete the title from 1774 to 1792, a period of eighteen years. 2 *Wash.* 106. *Pickett* v. *Dowdall.* 2 *Wash.* 121. *Curry* v. *Burns.* 1 *Wash.* 116. *White* v. *Jones.*

The doctrine of relation applies only to the parties themselves, viz. to M'Donald and the commonwealth of Virginia. It does not apply where the rights of third persons are concerned. *Co. Litt.* 190. *Plowd.* 188. 2 *Vent.* 200. 2 *Wash.* 113. 120, 121.

Rowan, in reply.

1. It was not necessary that the warrant should

have been in the hands of the surveyor. It was sufficient authority to him to survey the land if he knew that such a warrant existed. But if it were necessary that he should have had it in his hands, the presumption arising from his having made the survey is strong that he had the warrant, and is sufficient proof of that fact until the contrary be proved. The bill avers that the warrant was delivered to the surveyor. The answer does not deny it, and there is no evidence that it was not. It is a matter only between the complainants and the surveyor, and no other person can take advantage of it. It was no injury to the defendant.

2. The recording the survey within two months was a duty imposed by law upon the surveyor, and he was liable to a penalty if he neglected to do so; but his neglect could not invalidate the survey. It does not appear upon the record that the survey was not recorded within the two months. The presumption is, that the officer did his duty till the contrary appears. The act of 1748 requires the surveyor to return a list of his surveys to the college of William and Mary, who were entitled to certain fees upon every survey. It cannot be contended that the surveys were void if the list was not returned. There are a number of other things required of the surveyor by that act, yet it was never supposed that his neglect to do them would vacate his surveys. The recording was not intended as notice to others, because the surveyor was expressly forbidden by law to give a copy for twelve months. The only notice which the legislature intended should be given to subsequent purchasers during that period was the marking and bounding the land.

The survey is the appropriation. Sumner had all the notice which the legislature intended he should have. The depositions show that the land was actually marked and bounded; and that the marks and bounds were a matter of public notoriety.

The act of recording was a duty which the officer was bound to perform. The complainants could not compel him to perform it, and therefore they ought not to suffer if he neglected it. The issuing of the patent is strong evidence either that the survey was recorded in time, or that the want of such record did not invalidate the title. The register of the land office was the person best acquainted with all the prerequisites to a grant. After a lapse of thirty years, all these prerequisites are to be preserved until the contrary appears.

3. It was not necessary that the plat and certificate should be made out by the same officer who made the survey. Every thing that is done by a deputy surveyor is supposed in law to be done by the principal, and when the principal himself undertakes to act, there can be no question. The principal is the only officer known to the law whose certificate can be respected. If the deputy acts, it is in the name of his principal. The making out of a plat and certificate from the field-book is a mere mechanical operation. It may as well be done by another as by the officer who actually ran the lines.

4. The complainants were not bound to file their caveat. The delay is no argument against their claim. It appears from the record that the patent was made to the heirs or devisees of M'Donald. His death, and their minority, account for the apparent delay.

5. As to the surplus. There never has been a survey vacated in Kentucky because it contained more land than the warrant required. If the lines had comprehended less, the party must have been the loser. If they comprehend more, it does not vacate the survey. The case of *Beckley* v. *Bryan, Sneed*, 107. is decisive as to that point.

6. As to the equity of the case. It is not necessary now to inquire how the courts in Kentucky first obtained a chancery jurisdiction in cases of this

kind. By a long course of practice, the question of interfering surveys, or entries, has been a question in equity. It is a mode of getting behind the patent. An elder patent is only considered as a means of protecting the prior equity. *Sneed*, 231. 233. 248. 267. 283. 331.

The survey of M'Donald was a prior appropriation of the land. It was no longer waste, vacant, or unappropriated land. It was not a subject for Sumner's warrant to operate upon. Lapse of time cannot enfeeble a claim. It either destroys it altogether, or it has no effect.

If the court would restrict M'Donald to his 2,000 acres, where shall they be laid off? The impossibility of locating them, so as to designate the surplus, is a sufficient reason for not adopting the principle.

March 1.

MARSHALL, Ch. J. delivered the opinion of the court.

In this case the title of both parties originates in surveys made by the surveyor of Fincastle county, previous to the passage of the land law of Virginia. Both surveys were made on military warrants issued under the proclamation of 1763. The survey under which the plaintiffs claim, being prior in point of time, they have the first equitable title, and must prevail, unless the objections made to that survey be valid, or unless their equity is defeated by the circumstances of the case.

Several objections have been made to the survey, each of which will be considered.

1. It is said that the warrant was not in possession of the principal surveyor when the survey was made.

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The answer given to this objection is conclusive. The warrant is an authority to, and an injunction on, the surveyor to lay off 2,000 acres of vacant land which had not been surveyed by order of council, and patented subsequent to the proclamation. Whether acts under this authority are valid or void, if the authority itself be not in possession of the officer, is perfectly unimportant in this case; because the court considers the certificate of the surveyor as sufficient evidence that the warrant was in his possession, if, in point of law, it was necessary that it should be lodged in the office. That certificate is in the usual form, and states the survey to have been made by virtue of the governor's warrant, and agreeably to his majesty's royal proclamation.

2. The second objection is, that the survey does not appear to have been recorded within two months after it was made.

The opinion, that this omission on the part of the surveyor avoids the title which accrued under the survey, is founded on the 6th section of an act passed in the year 1748, entitled, "An act directing the duty of surveyors of land." In prescribing this duty the law, among other things, enjoins the surveyor "to enter, or cause to be entered, in a book well bound, to be ordered and provided by the court of his county, a true, correct and fair copy and plat of every survey by him made during his continuance in office, within two months after making the same."

This section is merely directory to the surveyor. It does not make the validity of the survey dependent on its being recorded, nor does it give the proprietor any right to control the conduct of the surveyor in this respect. His title, where it can commence without an entry, begins with the survey; and it would be unreasonable to deprive him of that title by the subsequent neglect of an officer, not appointed by himself, in not performing an act which the law does not pronounce necessary to his title,

the performance of which he has not the means of coercing.

If the omission to record the survey in two months would avoid it, then the omission of any other act enjoined by the same section would equally avoid it. The surveyor is directed to see the land "plainly bounded by natural bounds, or marked trees." Has his conforming to this direction ever been inquired into, in a contest respecting the validity of a survey? Would any gentleman of the bar contend that the land was not plainly bounded, and that, for this reason, a survey actually made was void? He is, within five months, to deliver to his employer a plat and certificate. Suppose six months should elapse before he complies with this duty, is the survey void? He is to certify the true quantity of land contained in the survey. Would the gentlemen from Kentucky be willing to adopt it as a principle that every survey expressing a quantity more or less than the true quantity is absolutely void? He is to state the water-courses, and also the plantations next adjoining. Should any one of these be omitted, is the survey void? He is to return a list of surveys in the month of June annually to the clerk's office. Should he fail in this, are the surveys void? On these points it is impossible seriously to insist; and the court can perceive no distinction between them. They are all merely directory to the officer, and none of them affect a title which commenced before they are to be performed. He is subjected to a penalty for failing in any one of these duties, but his performing or omitting them is unimportant to the rights of those for whom surveys have been made.

3. The third objection is of more weight. It is, that the survey must be certified by the person who made it, and can be authenticated in no other manner.

That, in point of fact, this survey was certified as made, is not doubted. But it is said that the

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plat and certificate want those appropriate forms which alone the law will receive as evidence of their verity.

The survey was made by Hancock Taylor, assistant surveyor of Fincastle county, from whose field-notes, the plat and certificate were made out by his principal, who also signed them. Hancock Taylor was prevented from performing this duty by a mortal wound received from the Indians. It is understood to be usual for the assistant, where surveys are actually made by him, to sign the plat and certificate, which are also signed by his principal.

The 46th section of the act, "for settling the titles and bounds of lands, and for preventing unlawful hunting and ranging," enacts, "that every survey of lands *intended to be patented* shall be made and returned by a sworn surveyor duly commissioned for that purpose."

Let us inquire whether, under this section, the plat and certificate must be made out by the person who made the survey, and whether a survey actually made by an assistant must be platted and certified by him.

It may be of some importance, in the construction of this section, to inquire whether the return alluded to is to the office of the principal surveyor, or to the land-office, out of which the patent is to issue.

In construing this section, the accompanying sections afford us no aid. But the general object of the act, and the allusion to *patenting* which is made in the section, would lead to the opinion that returns to the land-office were in contemplation of the legislature. If we examine the laws generally, we shall find that most usually the word "surveyor" is applied to the principal, and where the law alludes to the assistant, he is designated by the term "assistant surveyor." If the return directed by this section is to be made to the land-office, for the pur-

pose of obtaining a patent, then the principal surveyor is the person who is to certify it, and a survey actually run by himself, or by his assistant, is to be considered, in law, as a survey made by himself. It is believed to be most usual for the plat and certificate returned to the land-office, to be signed by the principal and by his assistant; but this section seems not to require both. The signature of the assistant is the justification to the principal for recording and certifying the survey, and is the best testimony that it has been made; but the law does not require, in terms, that where that best testimony is unattainable, no other shall be received. So far as the section which has been recited goes, the signature of the principal surveyor sufficiently authenticated this plat, and that a patent has issued upon it, is proof that such was the opinion entertained in the land-office. A patent certainly does not issue of course, unless the papers on which it issues be regular. A plat not legally authenticated is no plat, and the register cannot justify issuing a patent on it.

This consideration certainly deserves some weight: but if the court inspect this section, it seems, in fair construction, to require only the signature of the principal surveyor, who, consequently, judges, in the first instance, of the testimony which will enable him to certify a survey. If the signature of the assistant can be dispensed with, then other testimony than his signature may authorize the principal to certify a survey; and if, in any possible case, other testimony can be deemed competent, it surely may in this.

If the return directed by this section be understood to be a return to the office of the principal surveyor, it is necessary to inquire what it is that the section exacts. It is, that the "survey shall be made and returned by a sworn surveyor," not that the plat shall be made out and certified to the principal by the assistant who run the lines. The courses and distances contained in the field-book of the assistant, represent to the principal as correctly

and as intelligibly the survey actually made, as the plat and certificate could do. From these data he is as capable of placing on his record-book a correct plat, and of returning that plat to the land-office, as if the lines of the survey had been placed on paper by the assistant himself. It would seem reasonable, therefore, even on this construction of the section, in the actual case where death has disabled the assistant from platting his works, to consider the law as satisfied by the delivery of those works to the principal surveyor.

The "act directing the duty of surveyors of land" does not appear to this court to contain any provisions which are opposed to the construction here made of the preceding act of the same session. The 6th section of that act, which has been particularly referred to by counsel, prescribes the duty of surveyors, but contains no direction respecting the signature of plats and certificates, except this: "Every surveyor making a survey of land shall see the same plainly bounded by natural bounds, or marked trees, and within five months after survey, shall deliver to his employer a plat and certificate thereof."

It has never been understood that this plat and certificate may not be delivered by the principal; and other parts of this section show that the duties enjoined, are some of them to be performed by the principal. The section proceeds to say, "and shall also enter, or cause to be entered, in a book well bound, to be provided by the court of *his* county, a true, correct and fair copy and plat of every survey by *him* made." Now this book is the book of the principal. It is, of course, his duty to superintend the entries in it. They are to be "of the surveys by *him* made." The survey made by the assistant, is, then, to be entered by the principal as a survey by *him* made. He is also to return annually a list of the surveys by *him* made, to the county court clerk's office. This return is made by the principal. Certainly the list must include all the surveys made by

his assistants. They also are considered as made by him. Upon a view of the whole section, the court perceives nothing in it which renders it improper for the principal to plat and certify a survey made by his assistant whose field-notes are returned complete to him, and who has been disabled by death from making the plat himself.

This construction is very much strengthened by the terms of the act of 1779. That act declares "that all surveys of waste and unappropriated land made upon any of the western waters before the 1st day of January, 1778," "by any *county surveyor*, commissioned by the masters of William and Mary college, acting in conformity to the laws and rules of government then in force, and founded either upon charter," &c. "or upon any warrant from the governor for the time being, for military service, in virtue of a proclamation either from the king of Great Britain, or any former governor of Virginia, shall be and are hereby declared good and valid; but that all surveys of waste and unpatented lands made *by any other person*, or upon any other pretence whatsoever, shall be and are hereby declared null and void."

Notwithstanding this declaration, we find that patents have actually issued, under which both parties in this cause claim, on surveys made not by the county surveyor in person, but by his assistant. It is perfectly well known that a great proportion of the surveys recognised by this act have been really executed by assistant surveyors. Upon what principle of construction are they brought within the act? Clearly upon this. The law, so far as respects the validity of the survey, considers the act of the deputy as the act of his principal. A survey made by an assistant is, in law language, made by the principal. And if this idea be taken up on so material a clause as that which confirms or invalidates every survey previously made, and which is expressed in terms much more explicit and decisive than any of the clauses in the preceding acts, must

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not the idea be carried throughout? Must not the survey, in all cases, be considered in a legal point of view as made by the principal through the agency of his deputy, and must not this principal be kept in view in construing the laws upon the subject.

This survey, then, is, in law language, made by William Preston. It is confirmed as a survey made by him. The law recognises it as his survey. Assuredly, then, his certificate may authenticate it.

The act proceeds to say that "all and every person or persons, his, her or their heirs, claiming lands upon any of the before recited rights, and under surveys made as herein before mentioned, (that is, by a county surveyor,) against which no caveat shall have been legally entered, shall, upon the plats and certificates of such surveys being returned into the land-office, together with the rights, &c. upon which they were respectively founded, be entitled to a grant for the same."

To the court it seems clear that the law authorizes a plat and certificate of survey from the person whom it contemplates as the maker of that survey; that is, from the county surveyor. The formal requisites of the law are complied with by a plat and certificate under his signature. He has given it, in this case, on testimony, which the court deems as full and complete as even the plat certified by the assistant who made the survey would have been.

These are the objections which have been made to the survey under which the plaintiffs claim. After bestowing on them the utmost attention, the court is decidedly of opinion, that the survey of M'Donald was and ought to be considered as a good and valid survey.

4. The 4th objection to the plaintiffs' claim is founded on their negligence.

At law, this objection is clearly of no validity. The proviso to that section of the act of 1779, which has been considered, declares that such surveys shall be returned to the land-office within twelve months after the expiration of that session of assembly, or should become void. The time for returning them, however, was prolonged until this patent issued. Consequently, a *caveat* to prevent the emanation of the patent, because the survey was not returned in time, could not have been maintained. If the survey of M'Donald came within the law, the circumstance, that the subsequent survey of Sumner was made without notice in fact, cannot alter the case. His warrant only authorized him to acquire vacant land, and he took upon himself to find lands of that description. The principle, *caveat emptor*, is directly applicable.

5. The 5th objection made by the defendant is, that the patent of the plaintiffs contains surplus land. The warrant, it is said, was an authority to survey only 2,000 acres, and, for the surplus, the survey was made without authority.

It is a fact of universal notoriety in Virginia not only that the old military surveys, but that the old patents of that country generally contain a greater quantity of land than the patents call for. The ancient law of Virginia notices this fact, and provides for the case. It prescribes the manner in which this surplus may be acquired by other persons; and it is worthy of notice that the patentee must himself reject the surplus before it can be acquired by another, and, after having so rejected it, he has the election to allot it in such part of his patent as he pleases.

It is contended, however, that although a grant containing surplus land might give a legal right to such surplus, yet a survey could not be carried into grant so far as such surplus appeared upon a *caveat*.

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On this subject we find no act of Virginia under the regal government. At that time the governor and council constituted a branch of the legislature and the general court of the colony. They also held a distinct court in the council chamber for the trial of *caveats*, their decisions on which were regulated by rules established by themselves. These rules, it is believed, are lost; and it is also believed that the means of ascertaining satisfactorily what they were, are no longer attainable. The land law of 1779 was framed by men who understood them, and it is not unreasonable to suppose that, in drawing that law, some respect was paid to them. That law gives a *caveat* against a survey not returned to the land-office within twelve months after it is made, or whose breadth shall not be one third of its length, but gives no *caveat* on account of surplus land contained in a survey, nor does it indicate the idea that, on a survey containing such surplus, a *caveat* could not be supported. If such survey is not absolutely void for the whole, the difficulty of assigning the exact quantity is sufficient to have induced legislative regulation, had it been contemplated as the subject of a *caveat*. It would seem that, for security in this respect, the government trusted to the oaths prescribed for surveyors and chain carriers. It is also worthy of remark, that the law of 1779 superadds to the restrictions formerly imposed on taking up surplus lands contained in any patent, that it can only be done during the life of the original patentee, and before any alienation has been made.

It is also to be observed, that the act of 1779 confirms this survey, and it is understood that no previous entry was deemed necessary to its validity. The entries made on treasury warrants are most frequently in such terms that a survey for a greater quantity of land might be considered as being so far contrary to location, and might be restrained by the location; but, where there is no entry, the difficulty of restraining the survey is much increased, because there exists no standard by which to reduce it. There is, indeed, a standard as to quantity, but

not as to form and place. The survey is an appropriation of a certain quantity of land by metes and bounds, plainly marked by an officer appointed by the government for that purpose, and it would seem that the government receives his plat and certificate as full evidence of the correctness of the survey. This being the case, it is admitted by the government to be an appropriation of the land it covers, and it is difficult to discern a rule by which the survey could be reduced on a *caveat* by the owner of an interfering survey, unless the entry on which it was made was in such terms that the excess might be considered as surveyed contrary to location. For to every and to each part of the land surveyed, its owner has an equal right.

Whatever rules might have been established in the tribunal having jurisdiction of the subject, under the regal government, the *caveat* in this cause, had one been entered, must have been regulated by the act of 1779. That act gives validity to both surveys; and although it directs *caveats* depending in the council chamber, at the commencement of the revolution, to be transferred to the general court, and to be tried by the rules which governed when they were entered, it subjects future *caveats* to the law then introduced. Under this law, as has already been stated, the court can perceive but one principle on which a survey can be reduced on a *caveat*, and that principle is inapplicable to this case.

In conformity with this opinion is that of the judges of Kentucky. Not a case exists, so far as the court is informed, in which, on a *caveat*, the quantity of land in the survey of plaintiff or defendant has been considered as affecting the title, upon the single principle of surplus. Yet the fact must have often occurred. And in the case of Beckly *v.* Bryan and Ransdale, the contrary principle is expressly laid down. In that cause the court said, "It is proper to premise that there is but one species of cases in which any court of justice is authorized by our land law to devest the owner of a sur-

vey of the surplus included within its boundaries; namely, where the survey was made posterior to an entry made by another person on the same land; and to do more would be unequal, and unjust, inasmuch as a survey which is too small cannot be enlarged.

This position, it is true, was laid down in a contest between a military survey and a patent on a treasury warrant. But it is laid down in terms equally applicable to a contest between two military surveys; and the court does not understand that the law has ever been otherwise understood in Kentucky.

The opinions delivered by the judges of appeals of Virginia in the case of *Johnson* v. *Buffington*, 2 *Wash.* 116. would incline this court very much to the opinion that the same rule prevailed in the council chamber before the revolution. In that case, under a warrant from Lord Fairfax for 300 acres of land, 450 acres had been surveyed, and the excess appeared on the plat. This survey had lain in the office many years, and was clearly forfeitable; but Lord Fairfax had not taken advantage of the forfeiture. After his death a patent issued on a subsequent entry and survey, and the patentee was decreed to convey to the person claiming under the prior entry. In delivering his opinion Judge Fleming said, "The first objection made by the counsel for the appellant is, that the survey does not pursue the warrant; but I think there is no weight in this, as the variance is only in the quantity. If the land had been *imperfectly* described, it might have been fatal."

Judge Carrington said, "He did not consider the variance between the warrant and survey, as to the quantity, as being of any consequence."

The President, who had been an eminent practitioner in the council chamber, said, "He felt no

difficulty about the variance in the quantity of the land."

The rules established by Lord Fairfax were known to conform to those of the crown, and the declarations of the judges in this case, all of whom were acquainted, in some degree, with the usages under the regal government, make a strong impression on this court in favour of the opinion that, in the council chamber, the law was understood to be, that excess in the survey was not to be regarded.

The law of this case, then, so far as respects the state of title previous to the emanation of either grant, appears to be with the first survey. It remains to inquire whether a court of equity will relieve against the legal title acquired by the first grant.

The principle on which relief is granted is, that the patent, which is the consummation of title, does, in equity, relate to the inception of title; and, therefore, in a court of equity, the person who has first appropriated the land in contest has the best title, unless his equity is impaired by the circumstances of the case.

In this cause, the first patentee is said to be a purchaser without notice. But, for the reasons assigned in a former part of this opinion, the court does not consider him as clothed with that character. His warrant authorizes him to survey waste and unappropriated lands, and he undertakes himself to find lands of that description. The government acts entirely on his information; and the terms of his grant are, that the lands were waste and unappropriated. It is not for him to say that he had misinformed the government, and had surveyed appropriated instead of vacant lands, and had thereby entitled himself to be considered as a purchaser without notice.

Neither does the court conceive that the plaintiffs

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have forfeited their right to come into a court of equity, by their negligence.

In the case of 1 *Wash.* 116. the prior right of the plaintiff had been absolutely forfeited, so that the defendant had the first title both in equity and law, and the plaintiff's bill was dismissed because he failed to prove the fraud which he alleged, and which was, in that case, necessary to give the court jurisdiction.

In the case of Picket and Dowdale, and of Currie and Burns, there were both forfeiture and abandonment.

In the case of *Johnson and Brown*, 3 *Call*, 259. more than sufficient time had elapsed between the entry and survey of the plaintiff to produce a forfeiture; but, by the old law, notice was to be given by the surveyor before a forfeiture could take place, and this fact was not proved. During forty years this entry had been totally neglected; and the court was of opinion that, after such a lapse of time, the fact of notice by the surveyor might be presumed. This case then also turned on the principle of forfeiture. There were, besides, a great many circumstances in Johnson's title which gave a strong bias to the judgment of the court.

The difference between the case under consideration, and those cited is apparent. But the case of Johnson *v.* Buffington was much stronger than this. The prior survey was actually forfeitable, but had not been forfeited; and in that case, after a much longer time than exists in the present, a court of equity supported it against the eldest grant.

The general principles which have been relied on, in this branch of the argument, cannot be considered as applicable to a case in which the act, which constitutes the foundation of the charge of negligence, was performed within the time allowed by statute

for its performance. The circumstances, which excused the owners of military surveys for not returning them, were before the legislature and have been declared, by law, to be sufficient.

But it is contended that the plaintiffs can have no equity beyond the 2,000 acres contained in the warrant on which M'Donald's survey was made.

If this court is to consider itself as merely substituted for a court of law, with no other difference than the power of going beyond the patent, this question is already decided. But, in the case of *Bodley and Hughes* v. *Taylor*, an opinion was indicated that its jurisdiction, not being given by statute, but assumed by itself, must be exercised upon the known principles of equity. This opinion is still thought perfectly correct in itself. Its application to particular cases, and indeed its being considered as a rule of decision on Kentucky titles, will depend very much on the decisions of that country. For, in questions respecting title to real estate especially, the same rule ought certainly to prevail in both courts.

But, in its equity, this case differs essentially from Bodley and Hughes v. Taylor. In that case, Taylor had the eldest entry as well as the eldest patent. In this, the eldest equitable right is with him who holds the eldest* grant. In that case, the variance between the entry and survey of the elder right is established by a set of rules growing out of expositions subsequent to the survey. In this, the eldest grant is founded on a survey made on land which, in point of fact, was previously appropriated. But, which is of great importance, in that case, the terms of the subsequent location prove that the locator considered himself as comprehending Taylor's previous entry within his location, and, consequently, did not suppose so much of the land covered by his entry as being then subject to appropriation.

* *Quære, youngest?*

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He either did not mean to acquire the land within Taylor's entry, or he is to be considered as a man watching for the accidental mistakes of others, and preparing to take advantage of them. What is gained at law by a person of this description, equity will not take from him; but it does not follow that equity will aid his views, and give more than the law gives him, by allowing him to hold what he has legally gained, while he demands what is legally lost.

In this case, M'Donald supposed himself to be appropriating, and in fact was appropriating, land to which no other had, at the time, any pretensions.

In addition to these strong differences, in equity, between the two cases, no decision of Kentucky was shown to the court, which was applicable to the case of Bodley and Hughes v. Taylor. But the case of Beckly v. Bryan and Ransdale is conceived to be an authority in point for this case. The decision of the court of appeals of Virginia, in the case of Buffington and Johnson is also considered as expressly in point, and is to be respected, because both these surveys were made while the country in which they were made formed a part of Virginia.

It is thought not absolutely unimportant, in a court of equity, that one of the circumstances has occurred, which, at law, rescues the surplus land in M'Donald's patent from the possibility of being acquired by any other person. An alienation has taken place. The decree, therefore, of the court for the district of Kentucky, is to be reversed, and the defendant must be decreed to release to the plaintiffs, respectively, the lands within Sumner's patent which lie within the lines of the land conveyed by M'Donald's heirs to them respectively.

THE UNITED STATES *v.* JOHN ARTHUR AND ROBERT PATTERSON.

ERROR to the Kentucky district court of the United States, in an action of debt on a bond for 6,000 dollars.

The want of oyer of the condition of a bond in plea of performance is fatal.

Upon demurrer, the judgment of the court must be against the party who commits the first error.

The *capias ad respondendum* issued on the 28th of June, 1803, returnable to the first Monday of July in the same year, and was served on the 30th of June.

The declaration was in the usual form of an action of debt for the penalty of the bond with a *profert*, but without setting forth its condition or any breach thereof.

The defendants, without praying *oyer*, pleaded as follows: "And the defendants, by their attorneys, come and defend the wrong and injury when and where, &c. and for plea say they have well and truly kept and performed, and have faithfully executed and discharged, all and singular the duties enjoined on them by the laws of the United States, and the conditions in the writing obligatory in the declaration mentioned, and this they are ready to verify," &c.

The plaintiffs replied, that they ought not to be barred, &c. because they say "that the said defendants have not well and truly kept the several conditions in the said writing obligatory, as they in pleading have alleged, but have broken the same in this, to wit, that the said John Arthur, although duly appointed to the office of collector of the revenue for the first division of the first survey of the district of Ohio, as stated in the said condition, had not, at the time of executing the said writing obligatory, executed and discharged, nor after the execu-

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tion thereof, did he continue to execute and discharge faithfully all the duties of said office; and *also failed* to settle his accounts with the *proper officer* according to law for more than six months previous to the institution of this suit, and *also failed* to pay over to the *proper officer* the duties which *were collected, or the duties which by law, and the accounts rendered by the said John, he was bound to collect and pay over; and is in arrear* to the said United States in the sum of sixteen thousand, one hundred and eighty one dollars and fifteen cents, due from and unpaid by him in his said office of collector as aforesaid; and this the said plaintiffs *pray may be inquired of by the country.*"

To this replication the defendants demurred specially, "Because this suit is prosecuted under the 14th section of the act of congress passed in the month of July, 1798, c. 88. entitled, 'An act to regulate and fix the compensation of the officers employed in collecting the internal revenues of the United States, and to ensure more effectually the settlement of their accounts,' which section is in the following words, to wit: 'The bond of any supervisor or other officer of the revenue, who shall neglect or refuse, for more than six months, to make up and render to the proper officer, his accounts of all duties collected or secured, pursuant to such forms and regulations as have been, or shall be, prescribed, according to law, or to verify such accounts on oath or affirmation, if thereto required, or to pay over the moneys which shall have been collected, shall be deemed forfeited, and judgment thereon shall and may be taken at the return term on motion, to be made in open court, by the attorney of the United States, unless sufficient cause to the contrary be shown to, and allowed by, the court; provided always, that the writ or process in such case shall have been executed at least fourteen days before the return day thereof;'

"And the plaintiffs, in assigning the breach in the following words, to wit, 'And also failed to pay

over to the proper officer the duties which were collected, or the duties which by law, and by the accounts rendered by the said John, he was bound to collect and pay over,' have assigned the said breach neither within the letter nor the meaning of the said section of the said act of congress; but the same is calculated to charge the said defendants with the amount of the duties due within the said first division of the first survey of the district of Ohio, whether the same is collected or secured, or not, or whether they could or might have been collected or not."

This demurrer being joined, the judgment of the court below was in favour of the defendants; and the United States brought their writ of error.

Rodney, Attorney-General, for the United States.

Whether the replication be good, or not, the defendants have committed the first error in pleading, and therefore the judgment of the court below ought to have been against them. The plea is bad for want of oyer of the bond, and of the condition, the performance of which is pleaded; as in the case of *Wallace* v. *The Duchess of Cumberland*, 4 *Term Rep.* 370. where the defendant, after praying oyer of the bond and condition, omitted to set forth the *recital* which preceded the condition; and the court said that the plaintiff might have signed judgment *as for want of a plea.*

But the replication is good in substance; and if it contain more than is necessary, the surplusage will not vitiate it. 4 *Dal.* 440. A replication may be bad in part, but good upon the whole. This replication states matter sufficient to entitle the plaintiffs to maintain an action upon the bond; and even if it afterwards state something which is inaccurate, it will not vitiate the whole. 3 *Term Rep.* 376. *Duffield* v. *Scott. Buller's* opinion. The breach need not be assigned in the words of the condition. It

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is sufficient if a substantial breach be set forth. *Doug.* 367. *Esp. N. P.* 209.

A demurrer admits all matters of fact although *informally* pleaded, if the right of the matter sufficiently appears. 1 *Tidd's Prac.* 649. (*London edit.*) *Hob.* 233.

The action is not necessarily brought under the 14th section of the act of July, 1798. That section does not prevent the United States from bringing actions in any other manner.

Pope contra.

The first error is in the declaration. No action can be maintained upon an official bond, until the condition be broken; and unless the declaration show the condition to be broken, it shows no cause of action in the United States. The act of congress only authorizes a suit to be brought upon such a bond when the obligor has failed in his official duty, and such failure is a part of the plaintiff's title to sue.

In the case of *Stoddert* v. *M'Clanaghan*, in the court of appeals of Kentucky, *Sneed's Cases*, 359. the court said, as the plaintiff could only sue in his own name, u • a bond given to the governor, by virtue of the act of assembly which gives a right of action upon such a bond to a *person injured*, the plaintiff ought in his declaration to have averred himself to be a person injured; otherwise he does not show a title in *himself* to sue.

LIVINGSTON, J. How does it appear that this is an official bond, and not a bond for a debt simply?

Pope. The bond of a public officer upon which a suit is brought is always a part of the record.

Rodney, in reply.

This case is not like that of *Stoddert and M'Cla-*

naghan. In that case the name of the plaintiff did not appear in the bond, and the only fact which could give him a right to sue upon the bond was that he was a person *injured.* But in the present case the plaintiffs are the obligees of the bond, and the defendants under their hands and seals have acknowledged themselves to stand indebted to the plaintiffs in the amount of the penalty of the bond. If they would take advantage of the condition of the bond they must show it.

February 24.

MARSHALL, Ch. J. delivered the opinion of the court, to the following effect:

If this case depended upon the replication, the judgment of the court must be in favour of the defendants. It is certainly bad, inasmuch as it charges the defendants with moneys not collected. But upon a demurrer the judgment is to be against the party who committed the first error in pleading.

The want of oyer is a fatal defect in the plea of the defendants; and the court cannot look at any subsequent proceeding. The plea was bad when pleaded. The judgment must be reversed, and the cause remanded for further proceedings.

Judgment reversed.

HEPBURN v. AULD.

HEPBURN *and* DUNDAS, *plaintiffs in error*, *v.* COLIN AULD, *defendants in error*;

and

HEPBURN *and* DUNDAS, *appellants*, *v.* COLIN AULD, *appellee*.

After a long possession in severalty a deed of partition may be presumed.

In equity, *time* may be dispensed with if it be not of the *essence of the contract*.

A vendor may compel a specific execution of a contract for the sale of land, if he is able to give a good title at the time of the decree, although he had not a good title at the time when, by the contract, the land ought to have been conveyed.

But a court of equity will not compel a specific performance unless the vendor can make a good title to all the land contracted to be sold.

THE *first* of these cases was a *writ of error* to the judgment of the circuit court of the district of Columbia, in an action of debt at common law brought by *Auld*, agent and attorney in fact for Dunlop & Co. against Hepburn and Dundas for 45,000 dollars, the penalty of the same articles of agreement which are recited in the case of *Hepburn and Dundas* v. *Auld*, *ante*, *vol.* 1. *p.* 321.

The *second* of these cases was an *appeal* from a decree of the same court dismissing the bill in equity brought by Hepburn and Dundas against Colin Auld, to compel him to accept the land, and pay the difference between the agreed value of the land and the award.

The questions in the two cases being substantially the same, they were heard and argued together.

The breaches assigned in the declaration, in the action of debt by *Auld* were, that Hepburn and Dundas did not, on the 2d of January, 1800, pay the amount of the award in cash, nor bills of exchange, and did not on that day assign and transfer to Auld, the contract of Graham, with full powers, &c.

Hepburn and Dundas pleaded a tender of the assignment of Graham's contract in three different pleas, the pleadings upon which ended in demurrers. The first raised the question whether Auld was obliged to accept a deed of assignment, the preamble of which stated a part of the consideration of the assignment to be "a full acquittance and discharge

of all the claims and demands of the said John Dunlop & Co. against them being made and executed by the said Colin Auld." The other two demurrers brought into view the title of Hepburn and Dundas to the land sold to Graham.

The *bill* of Hepburn and Dundas alleges that the agreement by Auld to accept an assignment of *Graham's* contract towards the discharge of the debt due from them to *Dunlop & Co.* and to give an acquittance and discharge of that debt, and of all demands, was the inducement for them to submit the accounts to arbitration. It also states the acts and letters of *Auld* subsequent to the tender, to show that he considered himself bound to accept the assignment. That on the 27th of June, 1801, after recovering judgment in ejectment against *Graham's* heirs, *Hepburn and Dundas* offered to make him a deed for the land, but he refused to accept it.

The *answer* of *Auld* denies that he was bound to accept an assignment of *Graham's* contract which should bind him to give an acquittance and discharge of all demands of *Dunlop & Co.* against *Hepburn and Dundas*. He endeavours to explain his conduct and letters subsequent to the tender by saying that he was induced to do it by the representations of Hepburn and Dundas that it was necessary, and that the money due to them by Graham might be sooner recovered, or raised, by sale of the land, than by any contest at law relative to the transaction of the 2d of January, 1800. He denies that he ever considered the tender as good, but was willing to cooperate with them in bringing to an end the suit with Graham, until which time it would be doubtful whether a sufficient title in fee-simple could be obtained from them.

He avers that the *compromise* made with Graham's heirs was *without his consent*, and may be set aside when they come of age.

He says the offer of a deed on the 27th of June, 1801, was after he had brought suit against them

upon the award, and when it was apparent that their title was bad, or at all events doubtful.

In an amended answer, he states that he had requested them to exhibit to him their title papers, which they refused to do; and requires that they should produce them in court. He avers his belief that their title is defective.

Hepburn and Dundas filed a supplemental bill which states their title. It avers possession ever since 1773, and refers to certain title papers; they say that they verily believe their title to be good, and never heard a doubt till long after the tender of the assignment; that as soon as the objections were made known they took pains to remove them, and have lately obtained deeds of confirmation from the surviving patentees. That the title of *Sarah*, one of the co-devisees of *John West*, after her death in 1795, descended upon her brothers *Thomas*, *John* and *Hugh*, and her sister *Catharine*, and that *John*, *Hugh*, and *Catharine* have lately confirmed their title, and refer to the deeds; and they suppose that *Thomas* had passed all his title to *Sarah's* part by a deed executed before her death.

The title which they show in their supplemental bill is as follows, viz.

The six thousand acres were included in a patent for 51,302 acres of land, granted on the 15th of December, 1772, by the State of Virginia to George Muse, Adam Stephen, Andrew Lewis, Peter Hog, John West, John Polson, and Andrew Waggoner. This tract of 51,302 acres was in 1773 divided between the patentees who have occupied in severalty ever since. One of the shares containing 6,000 acres, was allotted to John West, who died seised thereof, and devised all his Ohio lands to be equally divided among his children Thomas, John, Hugh, Catharine, Sarah and Francina, excepting that Hugh was to have 1,000 acres more than any of the other children. The testator had but two tracts on the waters of the

Ohio, viz. that of 6,000 acres on the banks of the Ohio, and one of 1,400 acres on Pokitallico creek. The devisees made a partition among themselves; Francina's one thousand acres were allotted to her out of the 1,400 acres on Pokitallico creek, and she, and those claiming under her, have ever since held and enjoyed the same exclusively.

The tract of 6,000 was divided between the others; Hugh having 2,000, and the other four having 1,000 each.

Thomas, by deed of 20th of May, 1788, conveyed his 1,000 acres to Hepburn and Dundas.

John, by deed of 21st of February, 1790, also conveyed his 1,000 acres, in which deed Thomas was a party.

Hugh, also, by deed of 24th of April, 1788, conveyed his 2,000 acres.

Catharine intermarried with Baldwin Dade, who, with her and Thomas West, by deed of 20th of June, 1788, conveyed to Hepburn and Dundas her 1,000 acres.

Sarah intermarried with John Bronaugh, who, with her and Thomas West, conveyed to Hepburn and Dundas her 1,000 acres, by deed of 21st of February, 1790.

Thomas, also, by deed of 25th of April, 1788, quitclaimed to Hepburn and Dundas the 2,000 acres conveyed by Hugh.

By virtue of these deeds Hepburn and Dundas aver that they were seised of the 6,000 acres, and so continued seised and possessed until the contract with Graham.

They then proceed to answer some objections to their title which had been suggested by Auld.

They say that he had objected that the original patentees were joint-tenants, and that it does not appear that partition was made among them *by deed.*

To this they answer, first, that after such a lapse of time a deed ought to be presumed. And, secondly, that upon inquiry they found that *George Muse*, *Andrew Lewis*, and *Peter Hog* died before 1787; that *Adam Stephen* died since 1787, and Andrew Waggoner and *John Polson* were still alive, who made deeds of confirmation to Hepburn and Dundas. That they also obtained a like deed from the residuary devisee of *Adam Stephen.*

They also state that *Auld* had objected, that the partition between the devisees of *John West*, not being by deed, was not valid; and that *Francina*, although she had consented to take her thousand acres on *Pokitallico creek*, might yet claim a share of the 6,000 acres.

To this they answer, that a parol partition among the devisees was valid.

They state that it was further objected by *Auld*, that *Sarah Bronaugh* had never duly conveyed her 1,000 acres to Hepburn and Dundas, and that she was not privily examined according to the laws of Virginia.

To this they answer, that they believe she was privily examined, but the commission is lost or mislaid so that they cannot find it. And further that *Sarah Bronaugh* died in 1795, without issue; and *Francina*, who had intermarried with *Charles Turner*, died without issue in 1796, and her husband in 1802, by which deaths the interest of those ladies in the 6,000 acres, if any they had, devolved upon their brothers *Thomas*, *John*, and *Hugh*, and their sister *Catharine Dade*, whereupon Hepburn and Dundas obtained from *John* and *Hugh*, and *Baldwin Dade and Catharine Dade*, deeds of confirmation as to the shares of *Sarah* and *Francina.* They did not get such a deed from *Thomas*, because he

had before conveyed to them his interest in those lands.

Auld's answer to the supplemental bill, denies that any division ever took place between the devisees of John West, under his will, and avers that Francina always refused to sell her interest in the Ohio lands to Hepburn and Dundas, and that it was settled upon her husband Charles Turner, who died leaving two children by a second marriage.

That the interest of Sarah Bronaugh never passed from her to Hepburn and Dundas, for want of her privy examination.

That the deeds from Hugh West and Thomas West, were not recorded within the eight months, so as to be valid against creditors or subsequent purchasers without notice. That Thomas was embarrassed in his circumstances for many years previous to his death, and there are still debts due from him by bonds and judgments, which bind any lands which descended to him from his sisters Sarah and Francina.

Swann and *P. B. Key*, for the appellants.

E. J. Lee and *C. Lee*, for the appellee.

On the part of the appellants, it was contended,

1. That Hepburn and Dundas had done every thing on their part necessary to entitle them to a specific execution of the agreement, and to compel Auld to accept the land and give a release of all demands of Dunlop & Co. against them.

That they were entitled to such a release upon making the assignment of Graham's contract.

Upon this point the argument took nearly the same course as in the case between the same parties, *ante*, *vol.* 1. *p.* 324.

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They further attempted to show, from the evidence, that it was the intention of the parties that such a release should be given in case of the assignment of Graham's contract, and that instructions to that effect were given to the scrivener who drew the articles of agreement. In support of their right to prove those facts by parol evidence, they cited 1 *Fonb.* 188. 2 *Atk.* 203. 3 *Atk.* 388. 1 *Ves.* jun. 456.

2. That it was not necessary that Hepburn and Dundas should have had a complete legal title in fee-simple at the time of the agreement, nor at the time of the tender of the assignment of Graham's contract. But it is sufficient to entitle them to a specific execution of the agreement if they can now give a good title. *Sugden's Law of Vendors*, 249, 250.

Where time is not of the essence of the contract, the lapse of time is no bar to a specific execution. 1 *Atk.* 12. *Sug.* 246. 248. 2 *P. Wms.* 630. *Longford* v. *Pitt.* 2 *Pow.* 266. *Newland*, 230. 236. 238, 241.

Even if in this case time were material, Auld has waived it by his subsequent conduct. He never objected on account of defect of title. He never asked for the title papers till 1804, nor has the defect of title caused any delay. The title was never questioned until March, 1805, long after the present bill was filed.

The title is now complete. The only question which can possibly be raised is as to any supposed interest which may have descended from Sarah Bronaugh and Francina Turner upon Thomas West. But Thomas West, by joining in the deed from Mrs. Bronaugh, as well as by his own deed, has estopped himself from claiming any title. 5 *Bac. Abr.* 440. 445. tit. *Warranty.*

A deed of partition between the original patentees

ought now to be presumed after thirty-six years' possession in severalty. *Sug.* 213. 4 *Term Rep.* 482. *Cowp.* 216, 217.

It is not necessary under the law of Virginia that a deed of partition should be recorded.

For the appellee, it was said,

That Auld is a defendant. He does not come here to ask any thing. A court of equity will not decree that to be done which in equity and conscience ought *not* to be done. He is a mere agent. The intention of the parties was to pay a debt, not to purchase land. The agreement was that Graham's contract should be so assigned to Auld that he should either have the land, or the money, at his option. In order to do that, Hepburn and Dundas ought then to have had a good title; for Auld could not compel Graham to pay the money, if Hepburn and Dundas had not a good title. Auld did every thing that he ought to have done. He offered to receive such an assignment, and to give such a receipt, as were conformable to the agreement.

If the vendor has not a good title at the time when the agreement is to be performed, and the vendee brings an action at law upon the articles, the vendor cannot have a decree for a specific performance, although he afterwards obtain a good title before judgment in the suit at law.

In April, 1801, Auld brought his suit at law upon the articles, and, as late as 1806, Hepburn and Dundas had not a good title.

The original patentees were joint-tenants. The will of John West did not sever the joint-tenancy, but all his interest vested in the survivors. They could only sever *by deed.* 2 *Bl. Com.* 186.

Neither joint-tenants nor tenants in common in

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Virginia, could make partition by parol since the statutes for recording deeds.

That the completion of the title in Hepburn and Dundas, after suit brought by Auld upon the articles, was too late to entitle them to a specific execution. The counsel for *Auld* cited *Newland on Contracts*, 206, 207. 227. *Sugd.* 90, 91. 2 *Pow* 19. 37. 69. 75. 79. 221. 267. 4 *Ves.* jun. 849. 5 *Ves.* jun. 818. 3 *Atk.* 388. 573. 1 *Hen. & Munf.* 131. 2 *Bro. Chan. Cas* 343. 1 *Bro. Chan. Cas.* 93. 440. 2 *Pow.* 14. 2 *Ves.* 389. *Sugd.* 165. 5 *East*, 198. 1 *Wash.* 14. 1 *Vern.* 366. 1 *Ves.* 319. 1 *Fonb.* 107. 7 *Ves.* 211.

Even if there be only *doubts* about the title, a court of equity will not compel the purchaser to take it.

Parol testimony cannot be admitted to vary the written agreement. 1 *Ves.* 319. 426. 3 *Call*, 139. 2 *Bro. Chan. Cas.* 343. 4 *Ves.* jun. 849. 1 *Fonb.* 129.

The title as to Thomas West's part of Sarah Bronaugh's and Francina Turner's shares of the 6,000 acres, is clearly defective. He is not estopped by his deed to claim under a title which he has since acquired.

March 14.

MARSHALL, Ch. J. delivered the opinion of the court as follows, viz.

By the agreement of the 27th of September, 1799, the plaintiffs bound themselves, in the event of not paying, on the 2d of January, in bills of exchange, or money, the amount of the award to be rendered between the parties, to assign and transfer, on that day, to the defendant, a contract they had made with Graham, by which they had sold to him a tract of land containing 6,000 acres for the sum of 18,000

dollars, payable at different times, with interest. They also bound themselves to execute an irrevocable power of attorney enabling the defendant, in their names, to recover the possession of the land, or to enforce the payment of the purchase-money, at his election.

The defendant covenanted to accept this assignment, *towards* the discharge of the award, and, if it should exceed the amount thereof, to pay the excess.

On the part of the defendant it has been contended that this assignment was to be received as security for, and not as payment of, the debt due to Dunlop & Co. But on this point it is impossible to entertain a doubt. The contract itself is conclusive. The word "*towards*" was obviously introduced because, the award not being then made, it was uncertain whether the assignment would completely discharge its amount. But the words of the agreement admit of no other construction than that it was to be received either in part or in full payment, as the sum awarded might be of a greater or less amount than the stipulated value of the contract to be assigned. All the testimony connected with the agreement of September, 1799, tends to confirm this construction.

The next inquiry respects the transactions of the 2d of January, 1800. The plaintiffs insist, and the defendant denies, that the tender made by Hepburn and Dundas on that day was a legal offer to do what they had covenanted to perform.

The efficacy of the assignment itself is not questioned; but it is contended on the part of the defendant that the instrument is vitiated by the clause which is introduced into it, reciting, as a part of the consideration on which it was made, that a release of all claims and demands whatsoever, on the part of John Dunlop & Co. against them, had been given.

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The contract of September, 1799, certainly does not, in terms, stipulate for such a release; and if this recital in the deed of assignment could possibly prejudice John Dunlop & Co. that circumstance would unquestionably invalidate the tender. But if it should be deemed an unimportant recital, then the tender is a substantial performance of the contract, so far as it was to be performed on the 2d of January, 1800, and at least imposed on Colin Auld the duty of preparing an unexceptionable deed, and demanding its execution.

It has already been stated that, under the agreement of September, 1799, the assignment of Graham's contract was to be received in payment, and consequently that assignment, accompanied with a proper power of attorney, would discharge the award as fully as a payment in bills of exchange or money. Had the deed, therefore, limited its recital to a discharge of all claims and demands under the award, it would have been strictly correct; for to such a discharge Hepburn and Dundas were entitled. The deed of assignment, properly executed and received, and the power of attorney would, in law, have been a full payment of the award; and the subsequent claims of John Dunlop & Co. would grow out of the agreement of September, 1799.

The inquiry, whether the general terms of the recital affords any substantial objection to the deed, produces two questions.

1. Could John Dunlop & Co. have had any other claims and demands on Hepburn and Dundas, than were comprehended in this award?

2. Would this recital in the deed of assignment impair those claims which grew out of the agreement?

1. The papers themselves sufficiently show that every claim whatever of John Dunlop & Co. on Hepburn and Dundas was settled in the award. The

general complexion of the agreement of September, 1799, proves this; but the particular stipulation to give "a full receipt and discharge of all claims and demands of John Dunlop & Co. against them," in the event of payment of the award being made in money or bills of exchange, places the subject beyond any doubt. Dunlop & Co. had no claims and demands on Hepburn and Dundas, which were not settled in the award.

2. Could this recital impair the rights of Dunlop & Co. under the agreement of 1799?

The covenants of that agreement which were not completely satisfied were, 1st. That Hepburn and Dundas would not, after executing the deed of assignment, interfere with the measures which Colin Auld might think proper to pursue for the recovery of either the land sold to Graham, or the money due under Graham's contract; 2d. That they would convey the said lands in fee-simple, after the termination of the suit then depending, to the person who should be decided to be entitled to them.

1. The covenant not to interfere was not a present duty. The obligation it created did not come into existence until after the execution of the deed of assignment. It was to be a consequence of that deed. At the time of its execution, this was not a claim or a demand. Taking the words in their most literal sense, the covenant not to interfere would not, in the opinion of the court, be released by them: but the court is also of opinion that, if this was in any degree doubtful, these general terms would be restrained by the manifest intent of the parties, apparent on the face of the papers.

2. This release could not discharge the obligation to convey the lands, after the termination of the suit with Graham, for the reasons assigned against the foregoing objection, and for this additional reason; the deed intended to transfer to

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Auld all the rights of Graham under the contract, and is so expressed; and one of the covenants in the contract assigned was, to make a conveyance with a general warranty of a title free from all encumbrances.

The recital, then, presents no solid objection to the deed of assignment, because it could not impair the rights of Dunlop & Co. Yet it is unusual and unnecessary, and had Colin Auld prepared a deed which was perfectly unexceptionable, and Hepburn and Dundas had refused to execute it, this court, although the tender might have been good at law, would probably have held them responsible for any injury which might have been sustained in consequence of such refusal.

The power of attorney, which was tendered at the same time with the deed of assignment, appears entirely unexceptionable.

It is, then, the opinion of the court that, on the 2d of January, 1800, Hepburn and Dundas offered to do every thing which it was at that time incumbent on them to do; and that the tender made on that day, with the refusal of that tender, do in law amount to a performance, so far as to place Hepburn and Dundas in the same situation, with regard to the claims of Dunlop & Co. under the award, as if Colin Auld had accepted the deed. This, however, did not discharge them from the duty of executing a proper deed when required, nor from the duty of making conveyances for the land which was the subject of the agreement of September, 1799.

If a doubt existed on this point, the subsequent conduct of Colin Auld would, in a court of equity, amount to a waiver of the day, so far as respects the tender of the deed, and a consent to accept such deed at an after day within a reasonable time.

The subsequent demand of a deed by Colin Auld, when he tendered the money which was due on ac-

count of the excess of value in the estimated price of the land over the sum awarded to John Dunlop & Co. was made in a manner, and under circumstances, which are not deemed reasonable. Hepburn and Dundas had a right to consider and to take counsel on the deed they were required to execute; and although their delay was unnecessarily great, yet the offer they made might have been acceded to. In fact, they might reasonably insist on leaving the transaction on the ground on which it was placed by the contract of September, 1799, which would have been done in a manner free from all exception by executing such a deed as that tendered on the 2d of January, 1800, after striking out that part of the recital which respected the release.

The interference of Hepburn and Dundas, in accommodating the suit with Graham, is also urged as an objection to their conduct. They had certainly no right to interfere without the consent of Colin Auld. But when the correspondence is inspected, and it is perceived that they interfered only to effect the object he had himself desired, and which he had avowed his own inability to effect without their consent, the interference must be considered as innocent in point of intention, and unproductive of injury in fact.

The court, then, perceive nothing in the conduct of the plaintiffs, up to the decision of the suit with Graham, which ought to defeat their right to demand a specific performance of this contract. Could they at that time have conveyed a good title, Colin Auld ought to have accepted it.

It is alleged that the title, sold by the heirs of West to Hepburn and Dundas, was not a title to 6,000 acres of land in severalty, but an undivided interest in a much larger tract, and that, as this purchase was made, not for the purpose of acquiring an estate, but for the purpose of immediately selling and paying a debt which Auld was authorized to collect, the time of executing the contract is very material.

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It is not to be denied that circumstances may render the time material; and the court does not decide that this case is not of that description. But the majority of the court is of opinion, that the estate is to be considered as an estate held in severalty.

That a complete partition was made by an agreement, binding on all the parties who were interested, is in full proof. This partition would unquestionably have been protected in equity, and the majority of the court conceive that after such a lapse of time, and such a long separate possession, a deed of partition ought to be presumed; and that the court, in which the verdict in the ejectment against Graham was found, might so have directed the jury.

It remains, then, only to inquire whether Hepburn and Dundas hold a title under West, which is so free from exception that the defendant ought to be decreed to take it.

Long previous to the contract with Colin Auld, Hepburn and Dundas had obtained deeds from all the devisees of John West, jun. who were entitled to undivided parts of the 6,000 acres lying on the Ohio. But the deeds from Thomas West, and Hugh West, were not recorded, and the privy examination of Mrs. Bronaugh, one of the devisees, does not appear. By her deed, therefore, nothing passed, and the deeds of Thomas and Hugh West were liable to very serious objections.

Had Colin Auld refused to receive a conveyance from Hepburn and Dundas after the termination of Graham's suit, because they were unable to make a good title, the objection would certainly have been entitled to very serious consideration. But his rejection of the conveyance then offered was not induced by any defect in the title. He previously determined not to receive a conveyance, because Graham's contract had not been assigned in such manner as he conceived to be a full execution of

the agreement of September, 1799. These omissions, then, to record the deeds of Thomas and Hugh West, and the total want of title as to Mrs. Bronaugh's part, have produced no real inconvenience to Colin Auld. Had the title been unexceptionable, it would still have been refused; and this contest would still have been carried on with the same determined perseverance which marks the conduct of the parties. Under these circumstances, it is the opinion of the majority of the court, that this case ought to be governed by those general principles which regulate the conduct of a court of chancery in decreeing a specific performance, if the defect of title, which existed at the time of contract, be cured before the *decree*.

Are Hepburn and Dundas now able to convey a perfect title?

Mrs. Bronaugh and Mrs. Turner, two of the devisees of John West, jun. are dead. On the death of Mrs. Bronaugh, her real estate descended on her brothers and sisters, who were her coheirs. Deeds of confirmation from Hugh and John West, and from Dade and wife have been obtained. Thomas West joined in the deed from Bronaugh and wife for the purpose of releasing his supposed reversion; but there is no conveyance from Francina Turner.

The court is not satisfied that Thomas West, by uniting in the deed for the purpose of conveying his reversionary interest, has conveyed a title which afterwards descended on him, or has estopped himself from asserting that title. To Thomas West's part of Mrs. Bronaugh's 1,000 acres, then, Hepburn and Dundas have no title.

On the death of Francina Turner, her interest in her sister Bronaugh's estate, passed to her brothers and sister, who were her coheirs. To Thomas West's share Hepburn and Dundas have no title.

The undivided interest of Thomas West, which descended on him, at the death of Mrs. Bronaugh, is 166 2-3 acres; and the undivided interest which descended on him, at the death of Francina Turner, is 41 1-3 acres; making 208 acres, to which Hepburn and Dundas have, at this time, no title.

The omission to record the deed from Thomas West is not cured; and this court is now to decide whether, under these circumstances, Hepburn and Dundas are entitled to claim a specific performance.

Had there been simply a deficiency of 208 acres, the majority of the court would have considered it as a case for compensation; or had the parties entitled to this land been before the court, a division might possibly have been directed, and compensation for that quantity ordered: but, however this might be, as persons not before the court hold this interest, no order can be made respecting it; and it may very much embarrass those acts for asserting the title which may possibly be necessary. The part actually conveyed by Thomas West, too, never having been confirmed by a deed from himself or his heirs, properly recorded, might impose on Colin Auld the necessity of bringing a suit in chancery to perfect his title; or of being subjected to the inconveniences constantly attending the establishment of a deed not recorded, and the risks inseparable from such a deed.

This, therefore, is thought by a majority of the court to be a case not proper for a specific performance; *and the bill is to be dismissed.*

LIVINGSTON, J. expressed his non-concurrence in the reasoning of the court, in the latter part of the opinion just delivered by the chief justice. He would dismiss the bill, even if a good title could now be given by the complainants. This court can no more dispense with punctuality *as to time* in any case, than with any other part of the

agreement. But in this particular case, time was of the essence of the contract. The object was payment of a debt; and from the anxiety of the defendant to resist a decree for a conveyance, and the desire of the complainants to urge it upon him, it is to be presumed that the lands have fallen in value during this delay of the title. The remedy by a decree for a specific performance is a departure from common law, and ought to be granted only in cases where the party who seeks it has strictly entitled himself to it. It is said that by the English authorities, the lapse of time may be disregarded in equity, in decreeing a specific execution of a contract for land. But there is a vast difference between contracts for land in that country and in this. There the lands have a known, fixed, and stable value. Here the price is continually fluctuating and uncertain. A single day often makes a great difference; and in almost every case time is a very material circumstance.

He dissented also from another part of the opinion, which intimates that if this were simply a deficiency of a few hundred acres, it would be considered as a case of *compensation*. This part of the opinion does not seem to be necessary, and does not affect the present case; but this court can in no case compel a specific performance on terms and conditions. We cannot decree a special execution for part, and assess damages as to the residue.

This is like a contract for 5,000 bushels of wheat. A tender of 4,500 would not be good; and we could not compel the purchaser to take a less quantity than he contracted for. So here the contract was for 6,000 acres. The complainants have a title to a part only; we could not compel the defendant to take that part, and give him damages for the non-conveyance of the residue.

JOHNSON, J. observed, that he had perhaps taken a peculiar view of this subject, but he should be in favour of decreeing a specific performance gene-

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rally; leaving Auld to his remedy upon the warranty of the complainants for any defect of title which might appear. Auld, perhaps, thought it would be a good speculation, and had stipulated for a general warranty.

He acquiesced, however, in dismissing the bill, because he considered the judgment in the action at law brought by Auld against the complainants, as equivalent to a decree for a specific execution of the agreement, inasmuch as it prevents him from obtaining satisfaction in any other way for the sum awarded.

MARSHALL, Ch. J. declared the opinion of the court, *in the action at law*, to be, that the tender of the assignment of Graham's contract, and the power of attorney, was good as pleaded, and that Auld ought to have accepted it.

Judgment reversed.

THE UNITED STATES *v.* EVANS.

It is not a ground for a writ of error that the judge below refused to reinstate a cause after nonsuit.

ERROR to the district court for the Kentucky district.

In the court below, the judge at the trial rejected certain testimony which was offered by the attorney for the United States, who thereupon took a bill of exceptions, and became *nonsuit*, and afterwards, at the same term, moved the court to set aside the *nonsuit* and grant a new trial, upon the ground that the judge had erred in rejecting the testimony. But the court overruled the motion, and refused a new trial; whereupon the attorney for the United States sued out his writ of error.

The case was submitted by the *Attorney-General* and *Rowan*, without argument.

MARSHALL, Ch. J. delivered the opinion of the court, that in such a case, where there has been a *nonsuit*, and a motion to reinstate overruled, the court could not interfere.

Judgment affirmed.

YEATON AND OTHERS, CLAIMANTS OF THE SCHOONER GENERAL PINKNEY AND CARGO, *v.* THE UNITED STATES.

In admiralty cases, an appeal suspends the sentence altogether; and the cause is to be heard in the appellate court as if no sentence had been pronounced.

If the law under which the sentence of condemnation was pronounced be repealed after sentence in the court below, and before final sentence in the appellate court, no sentence of condemnation can be pronounced; unless some special provision be made for that purpose, by statute.

THIS was an appeal from the sentence of the circuit court for the district of Maryland, which condemned the schooner *General Pinkney* and cargo, for breach of the act of congress prohibiting intercourse with certain ports of the island of St. Domingo; *passed February, 28th* 1806. *Vol.* 8. *p.* 11. This act was limited to one year; but by the act of February 24th, 1807, it was continued until the end of the then next session of congress, when it expired on the 26th of April, 1808.

The schooner General Pinkney, on the 23d of August, 1806, was cleared from Alexandria for *St. Jago de Cuba* with a cargo, but went to *Cape François* in the island of St. Domingo, one of the prohibited ports. On her return, she was seized on the 17th of November, 1806, and libelled on the 5th of January, 1807, and condemned in the district court on the 23d of July following, which condemnation was affirmed in the circuit court on the 7th of November, from which sentence the claimants immediately appealed, in open court, to the supreme court of the United States, then next to be holden on the first Monday of February, 1808, where the cause was continued until the present term.

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The only question now argued was, whether this court could now affirm the sentence of condemnation, inasmuch as the law which created the forfeiture, and authorized the condemnation, had expired?

C. Lee, *Martin*, *Harper* and *Youngs*, for the appellants, contended that, in all cases of admiralty and maritime jurisdiction, an appeal suspends entirely the sentence appealed from; and that in the appellate court the cause stands as if no sentence had been pronounced. 1 *Browne's Civil Law*, 495. 501. 1 *Br. Parl. Cas.* 70. 590. *Rochfort* v. *Nugent*. 2 *Domat*, 686. 2 *Browne's Civil Law*, 436, 437. 3 *Dall.* 87. 114. 118. *Penhallow* v. *Doane*. 4 *Cranch*, 2. *Jennings* v. *Carson*. *Id.* 443. *United States* v. *The Betsey & Charlotte*. *Parker*, 72.

If then the case stands as if no sentence of condemnation has been passed, the question arises, can this court now proceed to condemn the vessel when there is no law authorizing a condemnation?

The act of congress makes no provision for the recovery (after the expiration of the act) of penalties or forfeitures which had been incurred under that act during its existence.

And in such cases the law has always been understood to be, that the penalty or forfeiture cannot be enforced, nor the punishment inflicted. The court has no longer any jurisdiction in the case. 2 *East's Cr. Law*, 576. *Jones's case*. 1 *W. Bl.* 451. *Miller's case*. 4 *Dal.* 373. 1 *Hale*, 291. *The case of the United States* v. *The cargo of the ship Sophia Magdalena, before Judge Davis, at Boston, and a like case before Judge Hall, at New-Orleans*. 1 *Cranch*, 103. *United States* v. *Schooner Peggy*.

Rodney, *Attorney-General*, on the part of the United States, did not controvert the principles contended for on the other side, but in addition to the

authorities produced by the opposite counsel, referred the court to the opinion of Ch. J. *Ellsworth*, in the case of *Wiscart* v. *Dauchy*, 3 *Dal.* 327. where he says, "an appeal is a process of civil law origin, and removes a cause entirely, subjecting the fact as well as the law to a *review* and *retrial;*" and to the opinion of *Marshall*, Ch. J. in the case of *Pennington* v. *Coxe*, 2 *Cranch*, 61.

March 7.

MARSHALL, Ch. J. delivered the opinion of the court to the following effect:

The majority of the court is clearly of opinion, that in *admiralty* cases *an appeal* suspends the sentence altogether; and that it is not *res adjudicata* until the final sentence of the appellate court be pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice not only in cases of appeal from the district to the circuit courts of the United States, but in this court also.

In prize causes, the principle has never been disputed; and in the instance court, it is stated in 2 *Browne's Civil Law*, that in cases of appeal *it is lawful to allege what has not before been alleged, and to prove what has not before been proved.**

The court is, therefore, of opinion, that this cause is to be considered as if no sentence had been pronounced; and if no sentence had been pronounced, it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.†

* *Clerke's Praxis, tit.* 54. "Nam in appellatione a sententia definitiva licet non allegata allegare et non probata probare."

† The cases of *Wilmot et al.* claimants of the schooner *Collector*, and *Lewis*, claimant of the schooner Gottenburgh v. United States, were reversed upon the same principle.

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The following sentence was then pronounced by the court:

This cause came on to be heard on the transcript of the record, and was argued by counsel; on consideration whereof the court is of opinion, that an appeal from the sentence of a court of admiralty brings the whole case before the appellate court unaffected by the sentence of condemnation from which the appeal is made, and that a sentence of condemnation cannot be pronounced on account of a forfeiture which accrued under a law not in force at the time of pronouncing such sentence, unless, by some statutory provision, the right to enforce such forfeiture be preserved.

The court is, therefore, of opinion, that the sentence pronounced in this cause by the circuit court of the district of Maryland, affirming the sentence of the judge of the district court in this cause, be reversed and annulled; and the court, proceeding to pronounce the proper sentence, doth direct that the libel be dismissed, and the property libelled be restored to the claimants, they paying the duties thereon if the same have not been already paid.

And, on the motion of the attorney-general, it is ordered to be certified that in the opinion of this court, there was probable cause of seizure.

THE UNITED STATES *v.* POTTS AND OTHERS.

"*Round copper bottoms turned up at the edge,*" are not liable to duties, altho' imported under the denomination of "*raised bottoms.*"

THIS was a case certified from the circuit court for the district of Maryland. The question upon which the judges of that court differed in opinion was,

Whether *round copper bottoms turned up at the edge* are liable to the payment of duty within the meaning of the several acts of congress.

The following facts were admitted, viz. that the defendants imported a certain quantity of round copper plates, under the denomination "*flat bottoms;*" round copper plates turned up at the edges, under the denomination of "*raised bottoms;*" and square and oblong copper plates, under the denomination of "*sheets.*" That the round copper plates, and the round copper plates turned up at the edge, are never used, nor imported for use in the form in which they are imported, although they are capable of being used, but not with convenience or advantage, in that form; but are worked up by the manufacturers in this country into vessels of use after importation. That the round copper plates, as well as the square copper plates, are cut from large sheets which are made by pressure under a roller, but are never imported in the size or shape in which they come from the roller. That it is a great convenience and saving to the manufacturer here that the sheets of copper should come in a round rather than in a square shape, avoiding great waste by clipping and repeated heats. That all the said articles are sold and bought by weight, and the same price paid for the round plates, and the round plates turned up at the edges, as for the square or oblong plates. That the round copper plates turned up at the edge are raised at the edge from four to five inches. That copper plates of this description are sold for eighteenpence sterling per pound, and that copper wrought up into vessels or implements of any kind, are sold at two shillings and fourpence to two shillings and sixpence per pound. That there is no copper imported into this country, under the denomination of *plates;* but that the square and oblong plates, which are commonly called copper plates, and are admitted to be free of duty, are imported under the denomination of *sheets.*

Harper, for the defendants.

This case differs from that of the *United States* v. *Kid & Watson*, 4 *Cranch*, 1. in one circumstance only. In that case it does not appear but that the

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copper plates turned up at the edge were imported under the denomination of *copper plates*, and the jury expressly found that they came under that description. But in the present case they were imported under the denomination of "*raised bottoms.*"

The real question is, whether these raised bottoms are to be considered as manufactured copper, or as much a raw material as plain copper plates.

The acts of congress on this subject are all to be construed together. They are the act of *July*, 4, 1789. *c.* 2. *Oswald's edit. Laws U. S. vol.* 1. *p.* 21. *The act of* 10*th of August*, 1790, § 1. *Laws U. S. vol.* 1. *p.* 251. *The act of May* 2, 1792, § 2. *Laws U. S. vol.* 2. *p.* 71. *And the act of June* 7, 1794, *Laws U. S. vol.* 3. *p.* 108.

Rodney, Attorney-General.

In the case of the *United States* v. *Kid & Watson*, the jury having found that the articles imported came under the description of *copper in plates*, there was nothing left for judicial decision.

But a question of revenue ought not to be left to the caprice, or misunderstanding of juries. It ought not to be left to the different customs or names used in different ports of the United States. The decisions on this subject ought to be uniform, and they can only be made so by the opinion of this court.

The case was submitted without argument.

March 7.

MARSHALL, Ch. J. delivered the opinion of the court to the following effect:

The opinion of this court is, that *copper plates turned up at the edge* are exempt from duty, al-

though imported under the denomination of *raised bottoms*.

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It appears to have been the policy of the United States to distinguish between raw and manufactured copper. From the facts stated, the copper in question cannot be deemed manufactured copper within the intention of the legislature.

The opinion certified to the court below was, that *round copper bottoms turned up at the edge* are *not* liable to the payment of duty within the meaning of the several acts of congress.

RUSH *v.* PARKER.

ERROR to the circuit court of the district of Maryland, in an action of replevin.

This court will give time to procure affidavits as to the *value* of the matter in dispute.

I. P. Boyd, for the defendant in error, contended, that the replevin bond being in the penal sum of 1,200 dollars only, was conclusive evidence that the matter in dispute, exclusive of costs, did not amount to 2,000 dollars, and consequently this court has no jurisdiction in the case.

Martin, contra, stated that he did not know till yesterday that this point would be made in the cause, and prayed time to show by affidavits the real value of the matter in dispute. Which

The court granted.

LIVINGSTON, J. thought that leave ought not to be given, on account of the delay it would produce. He had found a practice established here of receiving such affidavits; but he did not know of any case in which time had been given to produce them; and he would not consent to give it now. The case was

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brought up to last term. The party ought to have come prepared to support the jurisdiction.

March 15.

This being the last day of the term, and no affidavits having been produced,

The writ of error was dismissed, this court having no jurisdiction in the case.

LOGAN *v.* PATRICK.

The circuit court has jurisdiction in a suit in equity, to stay proceedings upon a judgment at law between the same parties, although the subpœna be served upon the defendant *out of the district* in which the court sits.

THIS was a case certified from the circuit court for the 7th circuit and district of Kentucky, in which the judges below differed in opinion upon the following questions:

Whether the complainant, (Logan,) who is a citizen of the state of Kentucky, and is so stated in the pleadings, can maintain this suit, in this court, against the defendant, who is a citizen and inhabitant of the state of Virginia, and is so stated in the pleadings, upon the following case: John Patrick obtained in this court a judgment in ejectment against David Logan, who filed a bill in equity against him to be relieved against the judgment, and to compel a conveyance of the land, and obtained an injunction to stay proceedings on the judgment; but the subpœna was not served in the district of Kentucky. Can this court entertain jurisdiction of the cause? If not, does the defendant's answering the bill, without insisting upon the objection that the process was not served upon him in the district of Kentucky, authorize the court to entertain the cause?

THE COURT, upon the first opening of the case,

said there could be no doubt of the jurisdiction of the court below, and ordered it to be certified accordingly.

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RODFORD *v.* CRAIG.

NO appearance having been entered on the docket for either party in this cause, no counsel appearing, the court ordered both parties to be called, and neither of them appearing, the court ordered the writ of error to be dismissed.

If the counsel on neither side appear when the cause is called, the writ of error will be dismissed.

The same order was made in the cases of *Banks* v. *Bastrop*, *Tompkins* v. *Tompkins*, and *Buchannan* v. *Yeates*.

HARRISON *v.* STERRY AND OTHERS.

THIS was an appeal from a decree of the circuit court for the district of South Carolina, in a suit in equity, in which *Richard Harrison* was *complainant*, and the following parties defendants, viz. 1. *The United States*. 2. *Sterry* and others, assignees of *H. M. Bird* and *Benjamin Savage*, under a British commission of bankruptcy. 3. *Aspinwall* and others, assignees of *Robert Bird*, under an American commission of bankruptcy. 4. Several *American creditors* who had attached the effects of *Bird*, *Savage & Bird*, in South Carolina. 5. Several *British creditors* who had also attached the same effects. And, 6. *Thomas Parker*, who, by consent of the creditors, had been appointed by the court of common pleas in South Carolina, an agent for all the parties concerned, to collect and receive the debts due to Bird, Savage & Bird, which had been attached, and when

In the distribution of a bankrupt's effects in this country, the United States are entitled to a preference, altho' the debt was contracted by a foreigner in a foreign country; and although the United States had proved their debt under the commission of bankruptcy, and had voted for an assignee. An assignment by one partner, in the name of the

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received, to hold the same till the further order of the court.

copartnership, of the partnership effects and credits, is valid.
Under a separate commission of bankruptcy against one partner, only his interest in the joint effects passes.
The bankrupt law of a foreign country cannot operate a legal transfer of property in this country.

The question was, how those attached effects should be distributed.

Harrison, the complainant, claimed them as a trustee for the benefit of certain creditors of the house of *Robert Bird & Co.* which was the name of the firm by which the house of Bird, Savage & Bird of London, carried on merchandise at New-York. Robert Bird, desirous of aiding and supporting the credit of the house of Bird, Savage & Bird, by raising funds, upon the security of the cargo of the East-India ship *Semiramis*, and certain debts to a large amount due to them in South Carolina, made a deed of trust on the 3d of December, 1802, intending thereby to assign that cargo and those debts to the complainant. The deed purported to be signed and sealed by *H. M. Bird* and *Benjamin Savage*, by *Robert Bird*, their attorney; and by *Robert Bird*, in his own right. It recited that, "whereas H. M. Bird, Benjamin Savage and Robert Bird, being copartners in trade under the several firms of Bird, Savage & Bird, and Robert Bird & Co. have in consequence of disappointments been obliged to borrow money from the bank of England, and under the firm of Robert Bird & Co. to purchase bills of exchange, public and bank stocks and goods, upon credit in America, in order to furnish means of more effectually supporting the credit of the said Bird, Savage & Bird of London. And whereas it may be necessary for the purpose aforesaid, that the said Robert Bird & Co. should continue to make such purchases until the present difficulties may be removed; and security having been already given to the persons bound as sureties to the bank of England, for their responsibilities, the said H. M. Bird, Benjamin Savage and Robert Bird, are desirous to secure all persons from whom purchases have been or may be made as aforesaid, for the purpose of aiding the said house or firm of Bird, Savage & Bird. Now, therefore, know ye, that the said Henry M. Bird, Benjamin

Savage and Robert Bird, for the purpose above expressed," &c. The trust expressed was "to apply the same and every part thereof for the equal security and indemnification, in proportion to their just demands, of all persons from whom the said Robert Bird & Co. shall, before the end of the year 1803, have made any such purchases of goods, stocks or bills, or who before that time shall be holders of any bills of exchange drawn or negotiated by the said Robert Bird & Co. for the purpose of giving support to the house of Bird, Savage & Bird, as aforesaid."

Another ground of Harrison's claim was a similar instrument of writing, dated the 31st of January, 1803, not under seal, but signed, "*Bird, Savage & B rd*," and "*Robert Bird & Co.*" which signatures were in the hand-writing of *Robert Bird.*

The bill of complaint stated that Robert Bird & Co. before and after the 3d of December, 1802, and before the end of the year 1803, made various purchases of stocks, goods and bills of exchange, and became indebted for bills drawn and negotiated by them for the purpose of giving support to the house of Bird, Savage & Bird, which debts remain unpaid. There was a letter of attorney from Henry M. Bird and Benjamin Savage, to Robert Bird, but it did not authorize him to *execute deeds* in their names generally.

The claim of the United States rested upon the priority given by the act of congress of the *3d of March*, 1797. *Vol.* 3. *p.* 423. § 5.

The *attaching* creditors relied upon their attachments under the laws of South Carolina.

The assignees under the several commissions of bankruptcy relied upon the British and American bankrupt laws.

The United States had proved their claim under the American commission, and had voted in the

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choice of assignees. They had also attached the effects in South Carolina, under the laws of that state, and had arrested Robert Bird, and held him to bail in New-York.

The court below decided that the United States were entitled to priority of payment. That after satisfaction of that claim Harrison would be entitled, under the assignment, to Robert Bird's third part or share of the property mentioned in the deed, and the attaching creditors to the other two thirds. That the assignees under the British commission could take nothing; and that the assignees under the American commission could take nothing but the surplus after all the other classes of creditors were satisfied.

From this decree all the parties, excepting the United States, appealed.

C. Lee, in behalf of the attaching creditors, admitted the priority of the United States, but contended that his clients were entitled to the whole of the surplus after satisfaction to the United States. They have a *legal* priority by means of their attachments, and they have equal equity. The statutes of South Carolina gives them as good a title at law as if goods were taken under a *fieri facias*.

Robert Bird's letter of attorney did not authorize him to make deeds of conveyance or assignment in the names of his partners; nor did his power as one of the firm extend to sealing deeds in their names, nor to assigning the partnership effects without seal. But a more solid objection to Harrison's deed is, that it was made to cover the property from the other creditors; and was made in contemplation of bankruptcy. It was not to pay a debt to Harrison, but to support the credit of Bird, Savage & Bird. It does not name the creditors, nor mention any sum which it was intended to secure. It could not convey more than an equitable title to Harrison in the *choses in action*, but the creditors who attached

gained *the legal title*, without notice of Harrison's claim. Equity will not deprive them of this legal title. 2 *Eq. Cas. Abr.* 85. Nor will equity protect an assignment of a *chose in action* except for a precedent debt.

The assignees under the British commission must yield to the attaching creditors. If they have any right, it can only be from the date of the assignment, which was subsequent to the attachments. *Doug.* 170. *Le Chevalier* v. *Lynch.* 2 *H. Bla. Hunter* v. *Potts.* 1 *H. Bla.* 665. *Sill* v. *Worswick.* 1 *East*, 6. *Smith* v. *Buchannan.*

This case differs from that of the *United States* v. *Hooe*, 3 *Cranch*, 73. That was an assignment of real estate; this is only of a *chose in action.*

It does not appear when the acts of bankruptcy were committed. The commission against Bird & Savage issued on the 12th of June, 1803; that against Robert Bird on the 5th of December, 1803, and as the act of bankruptcy must be within six months before issuing the commission, it must have been subsequent to the 5th of June, 1803, long subsequent to the attachments.

There is no distinction between the rights of the British and the American attaching creditors. They all come in according to the dates of their attachments.

MARSHALL, Ch. J. Does the law of South Carolina create a *lien* from the time of the attachment without power to release the attached effects?

Harper, for the assignees under the British and American commissions.

The attachment may be dissolved by bail; but if no bail is given, and judgment of condemnation be had, it relates back to the time of the attachment, in the same manner as a *fieri facias* lodged in the

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hands of the sheriff, under the statute of frauds. *Laws of South Carolina*, *p.* 188. § 3. and 8. But the 31st section of the bankrupt law of the United States, *vol.* 5. *p.* 67. destroys all liens created by prior attachments. We admit that the bankrupt laws of England have no such effect in this country.

The case of the *United States* v. *Fisher* establishes the right of the United States to priority of payment. But the United States may waive their right by coming in as a creditor under the bankrupt law. They stand on the same ground with the attaching creditor at *St. Kitts* in the case from *Douglass*. If he had afterwards proved under the commission, it would have been a waiver of his priority under his attachment. So if a mortgage creditor would prove under the commission, he must relinquish his mortgage.

The United States have proved their debt under the commission, and voted in the choice of assignees. If in such a case an individual would be excluded, so will the United States, unless they can show that the agent had no authority. It is stated to have been done by the attorney of the United States for the district, who is the proper officer to prosecute for, and recover the debts due to, the United States, in the manner most for the interest of the United States, according to the best of his judgment. The United States are bound even by his mistakes.

The United States have elected to prove under the commission, and are bound by that election.

The commissioners of bankrupt cannot distribute but as the bankrupt law directs. They cannot pay the United States more than their dividend *pro rata*.

The debt from Bird, Savage & Bird was contracted in England, where they were bankers for the United States. Can the United States claim a preference against British subjects resident in England? Can they claim it in this country, under the commission here against British subjects?

As to the claim of *Harrison*. The instrument of January 31, 1803, is not sufficient to transfer even the property of Robert Bird. It could not assign the joint effects, because that was an act which he had no right to do. He had no right to use the name of the firm for that purpose. It does not transfer his own *individual* right, because it purports to transfer the *joint* estate in the *joint* name.

It is an act attempted to be done by the firm. One member of a firm may sell the goods and give a good receipt, because they are acts necessary in the regular course of business. But how far does this power extend? We must look, for an answer, into the law of merchants. It extends to the drawing and accepting bills, making notes, bills of parcels, receipts, bargain and sale of chattels in the course of the trade; but not to the assignment of the property of the firm for the purpose of obtaining more credits, because this is not necessary in the usual course of their business. It is an extraordinary act in which all the members concur. It is a case not foreseen, nor contemplated, and therefore not provided for, by the law merchant.

In England a copartner cannot bind the firm by a bond: not because there is any magic in a seal, but because it is not necessary in the regular course of business. So with regard to real estate; one partner alone cannot convey. A secret assignment of property is not a regular mercantile transaction; and if one partner were permitted to make it, it might be the instrument of deception, if not of legal fraud.

But such an assignment is void by the bankrupt law. It is a conveyance, on the eve of bankruptcy, to give a preference to a particular class of creditors. It does not appear by the record that this assignment to Harrison was not of the whole estate of the bankrupts, at least the whole in this country.

It cannot operate as the deed of Robert Bird,

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because not executed in his own name, and as his deed. It cannot convey the joint interest of Bird, Savage & Bird, because, not executed in the name of the firm. And if it could, it is void under the bankrupt law.

As to the attaching creditors; the attachment, under the laws of South Carolina, did not change the property. It only gave a specific lien; but if it did change the property, still it is overruled by the express words of the 31st section of the bankrupt law.

The British creditors cannot give a priority by attachment in this country. They must come in under the British commission of bankruptcy; for they as well as the bankrupts were subject to the British bankrupt laws. They were bound by the assignment in England, and must claim under it, if they can claim at all.

P. B. Key, for *Harrison*.

The assignment to Harrison is legal and valid. It was at least competent to convey Robert Bird's interest.

The instrument of January 31, 1803, was not an act of bankruptcy in itself. It was more than six months prior to the issuing of the commission. It was a disposition of the property for a valuable consideration, not in payment of antecedent debts, but to raise new funds for the benefit of all the other creditors. This was not an unjust preference. It was equivalent to an absolute sale. Robert Bird had the full control over the debts due to the firm in this country. He could release, or assign and transfer, or sell, and, *à fortiori*, he could mortgage or pledge them. These creditors have peculiar merit. They advanced funds upon the credit of this property. The other creditors did not. The funds raised upon this property have been applied for the benefit of the general estate which has suffered no diminution by this exchange of property.

If the other creditors succeed in destroying this assignment to Harrison, they will have a double share, while these creditors will get nothing.

The priority claimed by the United States did not attach until the bankruptcy. The commission issued on the 5th of December, and the act of bankruptcy upon which it issued must have been committed within six months, next preceding, viz. after the 5th of June. But this assignment was long antecedent to that day. That the priority takes place when the event of insolvency happens, is to be inferred from the opinion of this court in the case of *The United States* v. *Fisher*, 2 *Cranch*, 385. 395.

Rodney, Attorney-General, for the United States.

The assignment to Harrison was made in contemplation of bankruptcy, and therefore void. It was made on the 31st of January, and on the 6th of February the commission issued in London. The situation of the house must be presumed to be known to all the partners. *Peake's Cas.* 200. *Burr.* 830. It was not made to secure previous debts; no sum is mentioned; the debts were unascertained. The possession was not delivered, nor even an assignment of the bill of lading.

If it was made to defeat the bankrupt law, or even to secure a creditor, it is void. *Burr.* 467. 474. *Cowp.* 117. 122. It is not necessary that it should have been of all the estate. An assignment even of one third is fraudulent. *Cowp.* 632. 3 *Wils.* 47. 4 *Burr.* 2239.

The assignees under a separate commission cannot recover the joint effects in their own name, but they may use the joint name. 1 *Johns.* 123. An assignment under a joint commission transfers the joint and *separate* property. 2 *P. Wms.* 500. *Cox's note, ex parte Cooke.*

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Harper. A joint commission may issue if all the partners be within the jurisdiction; but on a separate commission, nothing of the joint funds passes but the right of the bankrupt in them. *Comp.* 445. 449. 7 *Bac. Abr.* tit. *Merchant.* 12 *Mod.* 446. 1 *Ves.* 242.

March 15.

MARSHALL, Ch. J. delivered the opinion of the court as follows, viz.

The object of this suit is to obtain the direction of the court, for the distribution of certain funds in South Carolina, which were the property of a company trading, in England, under the firm of Bird, Savage & Bird, and in America, under the firm of Robert Bird & Co. The United States claim a preference to all other creditors, and their claim will be first considered.

Two points have been suggested, as taking this case out of the operation of the preceding decisions of the court respecting the priority to which the United States are entitled.

1. That the contract was made with foreigners, in a foreign country.

2. That the United States have waived their privilege, by proving their debt under the commission of bankruptcy.

1. The words of the act, which entitle the United States to a preference, do not restrain that privilege to contracts made within the United States, or with American citizens. To authorize this court to impose that limitation on them, there must be some principle in the nature of the case which requires it. The court can discern no such principle. The law of the place where a contract is made is, generally speaking, the law of the contract; *i. e.* it is the law by which the contract is expounded. But the right of priority forms no part of the contract

itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the court sits which is to decide the cause. In the familiar case of the administration of the estate of a deceased person, the assets are always distributed according to the dignity of the debt, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers; not by the law of the country where the contract was made. In this country, and in its courts, in a contest respecting property lying in this country, the United States are not deprived of that priority which the laws give them, by the circumstance that the contract was made in a foreign country, with a person resident abroad.

2. Nor is this priority waived by proving the debt before the commissioners of the bankrupt.

The 62d section of the bankrupt act expressly declares, that "nothing contained in that law shall, in any manner, affect the right of preference to prior satisfaction of debts due to the United States, as secured by any law heretofore passed."

There is nothing in the act which restrains the United States from proving their debt under the commission, and the 62d section controls, so far as respects the United States, the operation of those clauses in the law which direct the assignees to distribute the funds of the bankrupt equally among all those creditors who prove their debts under the commission. Omit this section, and the argument of the counsel for the general creditors would be perfectly correct. The coming in as a creditor under the commission might then be considered as electing to be classed with other creditors. But the operation of this saving clause is not confined to cases in which the United States decline to prove their debt under the commission. It is universal. It introduces, then, an exception from the general rule laid down in the 29th and 30th sections of the

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act, and leaves to the United States that right, to full satisfaction of their debts to the exclusion of other creditors, to which they would be entitled, had they not proved their debt, under the commission.

The priority of the United States is to be maintained in this case, unless some of the creditors can show a title to the property anterior to the time when this priority attaches.

The assignment made to Richard Harrison is, it is contended, such a title.

To this assignment several objections have been made.

1. It is said that Robert Bird was not authorized to make it, because it is not a transaction within the usual course of trade. But this court is of opinion that it is such a transaction. The whole commercial business of the company in the United States was necessarily committed to Robert Bird, the only partner residing in this country. He had the command of their funds in America, and could collect or transfer the debts due to them. The assignment under consideration is an act of this character, and is within the power usually exercised by a managing partner. In such a transaction he had a right to sign the name of both firms, and his act is the act of all the partners.

2. It is the assignment of a *chose in action;* and is, therefore, to be considered rather as a contract than an actual transfer, and could be of no validity against the several claimants in this case.

The authorities cited at bar, especially those from 1 *Atk.* and *Williams's Law Cases*, are conclusive on this point, to prove that equity will support an equitable assignment.

3. But a third exception has been taken to this instrument, which the court deems a substantial one.

It is made under circumstances which expose it to the charge of being a fraud on the bankrupt laws.

Considered as the act of Bird, Savage & Bird, it is dated but a few days before their bankruptcy; and considered as the act of Robert Bird & Co. it is but a short time before they stopped payment, and is made at a time when there is much reason to believe, from the face of the deed, as well as from extrinsic circumstances, that such an event was in contemplation.

Money actually advanced upon the credit of this assignment, subsequent to its date, might perhaps be secured by it; but there is no evidence that any money was actually advanced upon it, and the face of the instrument itself would not encourage such an opinion. It might be caught at by those who were already creditors, but holds forth no inducements to become creditors. It was impossible for any person viewing it to judge of the sufficiency of the fund, or of the pre-existing liens on it.

This assignment, therefore, under all its circumstances, many of which are not here recited, is no bar to the claim of the United States, or of the attaching creditors.

This being the case, there exists no obstacle to the priority claimed by the United States, and their debt is to be first satisfied out of the fund to be distributed by the court.

2. The attaching creditors are next in order.

By the bankrupt law of the United States, their priority, as to the funds of the bankrupt, is lost. They can only claim a dividend with other creditors. So far, then, as the effects attached are the effects of the bankrupt, their lien is removed by the bankruptcy.

Robert Bird alone has become a bankrupt under

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the laws of the United States. Consequently, only his private property and his interest in the funds of the company pass to his assignees. This interest is subject to the claim of his copartners, and if, upon a settlement of accounts, Robert Bird should appear to be the creditor or the debtor of the company, his interest would be proportionably enlarged or diminished. But he is not alleged to be either a creditor or a debtor; and of consequence, the court consider his interest as being one undivided third of the fund. This third goes to his assignees.

As the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States, the remaining two thirds of the fund are liable to the attaching creditors, according to the legal preference obtained by their attachments.

The court thinks it equitable to order that those creditors who claim under the deed of the 31st of January, 1803, and who have not proved their debts under the commission of bankruptcy, should be now admitted to the same dividend out of the estate of the bankrupt as they would have received if, instead of relying on the deed, they had proved their debts. The assignees, therefore, take this fund subject to that equitable claim, and in making the dividend, those creditors are to receive, in the first instance, so much as will place them on an equal footing with the creditors who have proved their debts under the commission.

With respect to any surplus which may remain of the two thirds, after satisfying the United States, and the attaching creditors, it ought to be divided equally among all the creditors, so as to place them on an equal footing with each other. The dividends paid by the British assignees, and those made by the American assignees, being taken into consideration, this residuum is to be so divided between them as to produce equality between the respective creditors.

BROWNE AND OTHERS *v.* STRODE.

THIS was a case certified from the circuit court for the district of Virginia, the judges of that court being divided in opinion upon the question whether they had jurisdiction of the case.

The courts of the United States have jurisdiction in a case between citizens of the same state, if the plaintiffs are only nominal plaintiffs *for the use of an alien.*

It was an action on a bond given by an executor for the faithful execution of his testator's will, in conformity with the statute of Virginia. The object of the suit was to recover a debt due from the testator in his life-time to a *British subject.* The *defendant* was a *citizen of Virginia.* The persons named in the declaration as *plaintiffs* were the justices of the peace for the county of Stafford, and were all *citizens of Virginia.*

The question being submitted without argument,

THE COURT ordered it to be certified, as their opinion, that the court below has jurisdiction in the case.

HODGSON AND THOMPSON *v.* BOWERBANK AND OTHERS.

ERROR to the circuit court for the district of Maryland. The defendants below were described in the record as "*late of the district of Maryland, merchants,*" but were not stated to be *citizens* of the state of Maryland. The plaintiffs were described as "*aliens* and subjects of the king of the united kingdom of Great Britain and Ireland."

Although the plaintiff be described in the proceedings as *an alien,* yet the defendant must be expressly stated to be a *citizen* of some one of the United States. Otherwise the courts

Martin contended, that the courts of the United

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States had not jurisdiction, it not being stated that the defendants were citizens of any state.

of the United States have not jurisdiction in the case.

C. Lee, contra. The judiciary act gives jurisdiction to the circuit courts in all suits in which *an alien is a party*. *Laws U. S. vol.* 1. *p.* 55. § 11.

MARSHALL, Ch. J. Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution.

(The words of the constitution were found to be "*between* a state, or the citizens thereof, and foreign states, citizens, or subjects.")

The court said the objection was fatal.

The record was afterwards amended by consent.

KEENE *v.* THE UNITED STATES.

The trial of seizures under the act of the 18th February, 1793, "for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," is to be in the judicial district in which the *seizure* was made; without regard to the district where the forfeiture accrued.

ERROR to the circuit court of the district of Columbia, in a case of seizure of certain merchandise, being part of the cargo of the schooner Sea Flower, Matthew Keene, claimant, imported from the Havanna, in the island of Cuba, into the port of Vienna, in the district of Maryland, the vessel having sailed on a *foreign* voyage under a *coasting* license. The goods having been landed at Vienna, were transported to Alexandria, in the district of Columbia, where they were seized by the collector of that port, and libelled and condemned in the district court of that district, whose sentence was affirmed by the circuit court.

Swann and *Martin*, for the plaintiff in error, contended,

That there was no law which authorized the sei-

zure, or the trial and condemnation out of the district into which the goods had been first imported.

The goods were condemned under the 8th section of the act of congress, "for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," *passed February* 18, 1793, *vol.* 2. *p.* 174. which enacts, "that if any ship or vessel, enrolled or licensed as aforesaid, shall proceed on a foreign voyage without first giving up her enrolment and license to the collector of the district comprehending the port from which she is about to proceed on such foreign voyage, and being duly registered by such collector, every such ship or vessel, together with her tackle, apparel and furniture, and the goods, wares and merchandise so imported therein, shall be liable to seizure and forfeiture."

By this act the forfeiture arises upon *importation*. The importation was complete at *Vienna*, in the *district of Maryland*, where only the trial can be lawfully had.

By the *35th section of the act*, it is enacted, "that all penalties and forfeitures which shall be incurred by virtue and force of this act, shall and may be sued for, prosecuted and recovered in like manner as penalties and forfeitures incurred by virtue of the act entitled 'An act to regulate the collection of the duties imposed by law on goods, wares and merchandise, imported into the United States, and on the tonnage of ships or vessels,' may be sued for, prosecuted and recovered, and shall be appropriated in like manner."

There is no act in the statute book with such a title. The only act *then* in force regulating the collection of duties on goods imported, and on tonnage, was the act of *August* 4, 1790, entitled "An act to provide more effectually for the collection of the duties imposed by law on goods, wares and mer-

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chandise, imported into the United States, and on the tonnage of ships or vessels."

By the 67th section of this act, it is enacted, "that all *penalties* accruing by any breach of this act shall be sued for, with costs of suit, in the name of the United States of America, in any court proper to try the same, *and the trial of any fact which may be put in issue, shall be within the judicial district in which any such* PENALTY *shall have* ACCRUED; and the collector, within whose district the seizure shall be made, is hereby authorized and directed to cause *suits* for the same to be commenced and prosecuted to effect, and to receive, distribute and pay the *sum* or *sums* recovered, after first deducting all necessary costs and charges, according to law. And that all *ships* or *vessels*, *goods*, *wares* or *merchandise*, which shall become *forfeited* by virtue of this act, shall be *seized*, *libelled* and *prosecuted* AS AFORESAID in the *proper court having cognisance thereof*," &c.

Here the words "*as aforesaid*" refer to the trial of the fact in the judicial district where the forfeiture was incurred.

This provision is also analogous to that contained in the 8th amendment of the constitution of the United States, which provides for the trial of all offences in the state and district where they were committed.

The property could not lawfully be seized out of the district of Vienna, unless by the collector of that port. But if the collector of Alexandria had a right to seize it, he ought to have sent it back to the district of Maryland for trial.

Congress need not have recited the title of the act to which they intended to refer, but having undertaken to do so, and not having recited it truly, it is as if no mode of trial had been provided; so

that there is no court competent to condemn the property.

Rodney, Attorney-General of the United States, contra.

The act referred to in the 35th section of the act of the 18th of February, 1793, is the act of the 31st of July, 1789, entitled "An act to regulate the collection of the duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States." This act is not in the common edition of the laws, having been repealed by the act of the 4*th August* 1790; but it is found in *Oswald's edit. of the Laws, vol.* 1. *p.* 25.

The title contains precisely the same words with the title recited in the 35th section of the act of the 18th of February, 1793. They are a little transposed, but the sense is the same. Whereas the title of the act of the 4*th August*, 1790, varies very essentially from the title recited. It is "An act *to provide more effectually for the collection of* the duties," &c.

It is no objection that the act of the 31*st of July*, 1789, was repealed before the act of the 18*th of February*, 1793, was passed. It remained in the statute book, and answered every purpose of reference as to the mode of recovering forfeitures, as well as if it had remained in force as a law respecting the collection of duties. It was referred to merely to prevent the necessity of transcribing its provisions respecting a particular subject.

But even the act of the 4*th of August*, 1790, *section* 67. does not require the trial of *forfeitures* to be in the district where the cause of forfeiture arose. It only declares that in actions for *penalties*, (not in suits for forfeitures,) "the trial of any *fact* which may be put in issue, shall be within the judicial district in which such *penalty* shall have accrued." But when it speaks of *forfeitures*, it says the goods, &c.

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"shall be *seized*, *libelled* and *prosecuted* as aforesaid, in *the proper* court having cognisance thereof;" which are precisely the same words with those contained in the 36th section of the act of the 31*st of July*, 1789.

It was not necessary by the common law that prosecutions on penal laws should be in the counties where the offences were committed. 3 *Inst.* 194. And the stat. of 21 *Jac. c.* 4. making it necessary in general cases, does not apply to *revenue cases*. 1 *Anst.* 220, 221. In such cases, when the proceedings are *in rem*, the place of seizure always designates the place of trial; and the *thing* must always be within the jurisdiction and power of the court where the trial is had, otherwise it can neither enforce a sale after condemnation, nor restore the goods upon a decree of restitution. It is said that the collector of Alexandria ought to have sent the goods back to the district of Maryland, for trial. But at whose risk and expense should they be transported? No provision is made by law for such a case. If he had sent the goods back to Maryland, and upon trial they had been acquitted, would the government take the risk and expense of retransportation to Alexandria? Nothing could be more unreasonable and inconvenient.

But if the act of the 18*th of February*, 1793, refers neither to the act of *July* 31, 1789, nor to that of the 4*th of August*, 1790, there is no mode of prosecution particularly specified in the act of 1793, and the question of jurisdiction must be decided by the judiciary act of September 24, 1789, the 9th section of which enacts that the district courts of the United States shall have exclusive original cognisance of all seizures under the laws of impost, *navigation*, or trade of the United States, where the seizures are made on certain waters, or on land, *within their respective districts*, as well as upon the high seas.

The collector of Alexandria not only had a

right, but it was made his duty to seize the goods under the 70th section of the collection law of 1799. *Vol.* 4. *p.* 390. But whether the collector had a right to seize or not, the seizure having been made, it was the duty of the court to take cognisance of it.

March 15.

LIVINGSTON, J. delivered the opinion of the court as follows, viz.

This is a seizure on land, by the collector of the port of Alexandria, for a breach of the act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same, passed 18th February, 1793.

The breach alleged is, that a certain schooner called the Sea Flower, duly enrolled and licensed, sailed to a foreign port, without having first given up her enrolment and license, and without being duly registered. That, on her return voyage, there were imported in the said schooner, from the Havanna into the port of Vienna, in the district of Maryland, certain goods, and thence transported to the town of Alexandria, in the district of Columbia, and within the collection district of Alexandria. The goods were condemned by the circuit court, and the only error relied on is, that there is no law authorizing a condemnation in a district different from that in which the forfeiture accrued.

The 35th section of the act under which the seizure was made, declares that all penalties, incurred thereby, shall be sued for in the same manner as penalties incurred by virtue of an act entitled "An act to regulate the collection of the duties imposed by law on goods, wares and merchandises imported into the United States, and on the tonnage of ships or vessels."

On examining the different acts of congress on this subject, there is none whose title exactly corresponds with the reference here made. It is con

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tended by the counsel for the United States, that the act here intended, although it does not bear, in terms, the same title, is the one regulating duties, which passed the 31st of July, 1789, and that this does not render it necessary that the trial should be within the district where the forfeiture accrued; while the plaintiff insists that, as this act had been repealed several years prior to the passing of the law under which this seizure was made, it is more probable that a reference was intended to another act, on the same subject, of the 4th of August, 1790, which requires that the trial of any fact which may be put in issue shall be within the judicial district in which any penalty shall have accrued. It is not improbable that this was the law intended; but as the title of neither corresponds with the one given in this act, the court thinks that the proceedings on forfeitures accruing under it, may well be governed by the 9th section of the act to establish the judicial courts of the United States, which confers, on the district courts, jurisdiction of all seizures under laws of impost, navigation, or trade of the United States, when the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burden, *within their respective districts;* and also of all seizures on land, or other waters, than as aforesaid made, and of all suits for penalties and forfeitures incurred under the laws of the United States. It is a fair construction of this section, taking the whole together, that nothing more is necessary to give jurisdiction in cases of this nature, than that the seizure should be within the district, without any regard to the place where the forfeiture accrued. It would, in many cases, be attended with much delay and injury, without any one advantage, were it necessary to send property for trial to a distant district, merely because the forfeiture had been incurred there. The court feels no disposition to impose these inconveniences on either of the parties, unless where it be positively directed by an act of congress. There being no provision of that kind in the law under which this forfeiture accrued, the court cannot perceive any error in the proceedings below; and

therefore orders that the *judgment of the circuit court be affirmed with costs.*

THE UNITED STATES *v.* RIDDLE.

ERROR to the circuit court of the district of Columbia, which had affirmed the sentence of the district court restoring certain cases of merchandise which had been seized by the collector of Alexandria, under the 66*th section of the collection law of* 1799, *vol.* 4. *p.* 388. because the goods were not "invoiced according to the actual cost thereof, at the place of exportation," with design to evade part of the duties.

The law punishes the attempt, not the *intention* to defraud the revenue by false invoices.

A doubt concerning the construction of a law may be good ground for seizure, and authorize a certificate of *probable cause.*

The goods were consigned by a merchant of Liverpool, in England, to Mr. Riddle, at Alexandria, for sale, accompanied by two invoices; one charging them at 67*l.* 5*s.* 6*d.* the other at 132*l.* 14*s.* 9*d.* with directions to enter them by the small invoice, and sell them by the larger. Mr. Riddle delivered both invoices and all the letters and papers to the collector, and offered to enter the goods in such manner as he should direct. The collector informed him that he must enter them by the larger invoice, which he did. But the collector seized them as forfeited under the 66th section of the collection law of 1799, which enacts, "that if any goods, wares or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods," &c. "shall be forfeited." The same section contains a provision for the appraisement of the goods by two merchants in case the collector shall suspect that the goods are not invoiced at a sum equal to *that at which they have been usually sold in the place from whence they were imported,* with a pro-

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viso that such appraisement should not, upon the trial, be conclusive evidence of the *actual and real cost* of the said goods at the place of exportation.

Rodney, Attorney-General for the United States, contended, that as the goods were invoiced lower than their actual cost, with intent to defraud the revenue, they were not invoiced *according* to their actual cost with the like intent; and the goods having been actually entered, although not by the fraudulent invoice, they were within the letter of the law, and ought to be condemned. Besides, it does not appear that the higher invoice was according to the actual cost.

Swann, contra.

The lower invoice was probably what the goods cost the consignor, who manufactured them. The higher invoice was what such goods were then selling for at that place.

But even if a fraud was contemplated, it was not carried into effect. No entry was made, nor *attempted* to be made by the consignee, upon the *false* invoice. It was made upon the true invoice, and in conformity with the directions of the collector.

In this case we hope there will be no certificate of probable cause. The conduct of the consignee has been fair and honourable in every respect. A doubt concerning the construction of a law is not "a reasonable cause of seizure."

MARSHALL, Ch. J. delivered the opinion of the court to the following effect;

The court thinks this case too plain to admit of argument, or to require deliberation. It is not within even the *letter* of the law, and it is certainly not within its *spirit*. The law did not intend to punish the *intention*, but the *attempt* to defraud the revenue.

But as the construction of the law was liable to some question, the court will suffer the certificate of probable cause to remain as it is. A doubt as to the true construction of the *law* is as reasonable a cause for seizure as a doubt respecting the fact.

Sentence affirmed.

HIMELY *v.* ROSE.

It is not necessary to take exceptions to the report of auditors, if the errors appear upon the face of the report.

If the property, ordered to be restored, be sold, interest is not to be paid.

THIS was an appeal from so much of the final sentence of the circuit court for the district of South Carolina, rendered upon the mandate from this court issued upon the reversal of the former sentence of that court, (*see ante, vol.* 4. *p.* 292.) as affirmed the report of auditors appointed by the court "to inquire and report *whether any*, and if any, what deductions are to be allowed for freight, insurance and other expenses which would have been incurred by the owners in bringing the cargo into the United States, and also to ascertain and report *the interest* to be paid by the claimant to the appellant," so far as that report allowed *interest* to the appellant, and disallowed the expense of insurance to the claimant.

This court, in reversing the former sentence of the circuit court, decreed as follows: that the Sarah and her cargo "ought to be restored to the original owners, subject to those charges of *freight, insurance* and other expenses which would have been incurred by the owners in bringing the cargo into the United States; which equitable deductions the defendants are at liberty to show in the circuit court. This court is therefore of opinion, that the sentence of the circuit court of South Carolina ought to be reversed, and the cause be remanded to that court in order that a final decree may be made therein conformably to this opinion."

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Upon receiving the mandate from this court to carry its sentence of reversal into effect, the circuit court directed a reference to auditors in the terms above stated; and the auditors reported "that the claimant is not entitled to any insurance, but that he ought to be allowed freight on the cargo at the rate of one cent per pound for such of it as was in bags, and one and a half cent per pound for such of it as was in casks, and also the sum of 500 dollars for expenses incidental to the landing, wharfage, storage, &c. of the cargo, which sums being deducted from the amount of the decree, the claimant must pay the appellant two years' interest on the residue at the rate of seven *per cent. per annum.*"

Martin and *Jones*, for *Himely*, the appellant.

After the express mandate of this court, directing the allowance of freight and insurance, the court below ought not to have referred it to auditors to say whether *any thing* should be allowed for insurance.

The mandate was silent as to interest; indeed, as the proceeding was *in rem*, and the decree for *restitution*, interest could not have been given.

LIVINGSTON, J. Can this court take notice of these errors in the report, if no exception were taken in the court below?

Martin. There were no particular items to which an exception was necessary. The error appears palpably upon the face of the proceedings. And this court, in the case of *Murray* v. *The Charming Betsy*, (*ante*, *vol.* 2. *p.* 124.) decided, that exceptions are not necessary if the error appear upon the face of the report itself.

Besides, in an appeal from a sentence of a court of admiralty, the question of fact is opened as well as the question of law.

MARSHALL, Ch. J. Nothing is before this court but what is subsequent to the mandate.

Martin. The auditors have allowed nothing for the expenses of the cargo at *St. Jago de Cuba;* Himely was as much entitled to those expenses under the decree of this court, as to those incurred in this country.

C. Lee, contra.

There were no exceptions to the report in the court below. It was there regularly confirmed by that court, whose decree ought to be affirmed in this, unless the directions of the mandate have been counteracted in one or both the particulars of which the appellant complains.

The mandate left the claim of insurance open to be adjusted in the circuit court, and unless insurance was proved to have been actually made, nothing should be allowed on that account.

It is now to be presumed and taken as an admitted fact, that no insurance was made by the appellant.

The interest was properly allowed, unless good reason can be shown in equity why it should not be paid. According to modern usage in commercial controversies, interest is deemed an inseparable incident to the principal debt, the payment whereof is wrongfully delayed. This being the general rule, and the mandate being silent, the allowance of interest is unobjectionable. As the claimant was to have the benefit of equitable deductions, he ought to be subjected to equitable charges. He has had the use of the money, and the other party has lost the interest of it.

The freight and other charges, as well as the value of the cargo, having been amicably arranged by the parties, and there being no appeal as to them, they are not now to be the subject of inquiry or decision.

Upon the question of interest, Mr. Lee cited 3 *Dal.* 332. *Hills* v. *Ross*, and 4 *Dal.* 289. *Crawford* v. *Willing and Morris.*

HIMELY v. ROSE.

March 10.

MARSHALL, Ch. J. delivered the opinion of the court as follows:

A decree having been formerly rendered in this cause, the court is now to determine whether that decree has been executed according to its true intent and meaning.

That decree directed "the cargo of the Sarah to be restored to the original owners, subject to those charges of freight, insurance and other expenses which would have been incurred by them, in bringing the cargo into the United States."

In carrying this decree into execution, an allowance has been made for freight, and for expenses incurred at the port of importation; but no allowance has been made for expenses at the port of lading, nor for insurance. The appellants, too, were charged with interest on the money into which the cargo had been converted.

No exception having been taken to this report, it is now liable to those exceptions only which appear on its face.

So far as respects freight, and the expenses at the port of entry and delivery, the report must be considered as correct; but in those items of the claim which were disallowed, the error, if it be one, is apparent on the face of the proceedings, and may therefore be corrected.

The court has not considered the appellants as infected by the marine trespass committed by the captors of the Sarah and her cargo. Their operations commence with their purchase at St. Jago de Cuba; and the decree designed, and is thought to have been so expressed as to charge the owners with all the expenses which they would have incurred, had they made the purchase themselves. Had they

done so, they must have incurred some expenses at the port of lading. Among these is certainly not to be estimated the price of the cargo; but any expense necessarily attendant upon the transaction, such as putting the cargo on board, may properly, under this decree, be charged to the owners.

It is obvious, too, that the owners, or the underwriters, if they represent the owners, had they been the purchasers, must have insured the vessel and cargo from St. Jago de Cuba to the United States, or must themselves have stood insurers; in which latter case, the risk is deemed equal to the insurance. The decree, therefore, formerly rendered by this court, is understood to have entitled the appellants o insurance.

The question of interest is more doubtful; but this court is of opinion that the appellants ought not to be charged with interest.

Restitution of the cargo was awarded. The property having been sold, the money proceeding from the sales is substituted for the specific articles. If this money remains in possession of the court, it carries no interest; if it be in the hands of an individual, it may bear interest, or otherwise, as the court shall direct. But it is not supposed that the party, to whom restitution is awarded, receives interest in such case, unless it be decreed by the court. This court did not decree interest; nor would interest have been decreed, in this case, had the particular fact of the sale been brought before them.

The circumstances of the case were such as to restrain the court from inserting in its decree any thing which might increase its severity. The loss was heavy; and it fell unavoidably on one of two innocent parties. The court was not inclined to add to its weight, by giving interest in the nature of damages. The allowance of interest, therefore, in the court below is overruled.

The sentence of the circuit court is reversed.

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JOHNSON, J. When the mandate of this court was received in the court below, auditors were nominated, by consent, to report what would be the usual mercantile allowance between the parties; and to state an account accordingly. Those auditors reported against the allowance of insurance, and in favour of interest. The supposition that the expense of transportation was not allowed. I am convinced, must be incorrect; for insurance and interest were the subject of the only two exceptions taken to their report. Upon hearing argument on these two exceptions, the court affirmed their report upon both these points, and I have since heard no reason to alter the opinion which I entertained on the argument below.

It is contended that the mandate of this court was peremptory as to the allowance of insurance, and did not sanction the charge of interest. The words of the mandate so far as relates to these points are the following: "subject to those charges for freight, insurance, and other expenses, which would have been incurred by the owners in bringing the cargo into the United States; which *equitable deductions* the defendants are at liberty *to show to the circuit court*," &c. These words imperatively require two things; viz. that the deductions, to be allowed to Himely, should be equitable in their nature, and should be shown to the court. Upon what ground could an allowance for insurance have been deemed just or equitable? It could only have been upon Himely's having actually paid an insurance, which he was at liberty to show, or upon his having himself incurred that risk which would have been covered by insurance. The fact was admitted that he had not insured, and as to having incurred any risk himself, I cannot understand in what possible view he could have incurred a risk, when this court has decided that if the property had been lost, he would have lost nothing. It was not the property of Himely, it was the property of Rose; had it been sunk in the ocean, it would not have been the loss of Himely, it would have

been the loss of Rose; there can be no reason, then, why Rose, who ran all the risk, should be adjudged to pay an insurance to Himely, who incurred no risk: but such is the effect of deducting it from the sum to be paid to Rose. After deciding that the property was not changed, that it still continued in Rose, and was never vested in Himely, I feel confused by the inquiry on what possible ground the allowance for insurance can be sanctioned.

With regard to interest, the question is not so clear, but the difficulty does not arise upon the abstract equity of the charge. In equity, interest goes with the principal, as the fruit with the tree. Rose is now to be considered as the rightful owner of the property, and ought to have had the possession and use of it, during the existence of this contest. But Himely, having given stipulation bonds, was, by the order of the district court, admitted to the possession and use of it, added it to his capital, traded upon it, and made such profits and advantages of it as his skill or ingenuity suggested. Rose, in the mean time, was kept out of the use of it, and lost those emoluments and mercantile advantages which might have resulted from the use of it. It was not a case in which the property is locked up in a warehouse, or the proceeds thereof deposited in the hands of the register of this court, but a case in which the goods were, in fact, converted into money by the effect of the stipulation bond, and the use of it given to Himely, to the prejudice of Rose: there could, therefore, be no radical objection to the charge, on the ground of equity. Had the mandate issued to restore to the party a flock of sheep, or stock, or bonds bearing interest, it is presumed that it would have been construed to authorize the delivery of their natural or artificial increase without any express words to carry them. But it is said that the mandate does not expressly authorize this allowance. This is true; but it must be recollected that the mandate of this court enjoins the allowance of *equitable deductions*. Now a variety of deduc-

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tions may be, in the abstract, equitable, but may lose that character by its being made to appear that ample compensation has been already made for them. It was in this light that the court below sustained the charge of interest: because having had the usufruct of the property concerning which those charges on his part, which merited the denomination of *equitable deductions*, were incurred, it appeared to the court in fact that he had been compensated in part for those advances by the use of the money. If this court had not made use of the terms *equitable deductions*, that court probably would not have thought itself sanctioned in doing what appeared so equitable between the parties.

March 15.

Martin and *Jones*, for the appellant, moved to open the principal decree; and stated that they were prepared to show that this court had been misinformed as to the law of St. Domingo. That they had further arrêtes, or ordinances, of the French government explanatory of that upon which the sentence was founded; and showing that the seizure of the property was the exercise of a belligerent, not of a municipal right.

They contended that while the property remained out of the jurisdiction of the United States, it was lost to the libellants, and that Himely was entitled to a compensation for bringing it within their reach. That he ought to be reimbursed at least what he paid for the property.

C. Lee, contra.

The appeal as to the execution of the mandate gives no right to open the original decree.

No further order was taken in consequence of the motion.

WELSH *v.* MANDEVILLE AND JAMESSON.

This court will not compel a cause to be heard, unless the citation be served thirty days before the first day of the term.

YOUNGS, for the defendant in error, objected to the hearing of the cause at this term, the citation not having been served thirty days before the first day of the term. The service was on the 12th of January, and the first day of the term was the 6th of February.

E. J. Lee, contra, contended, that it was to be inferred from the case of *Lloyd* v. *Alexander*, *ante*, *vol.* 1. *p.* 365. that if the defendant appears within the thirty days, the court will hear the case; or they will hear the case, after the expiration of the thirty days, even if the party does not appear.

Youngs. The 22d section of the judiciary act, *vol.* 1. *p.* 62. requires that the defendant in error should have thirty days' notice by the service of the citation.

The citation is to appear on the first day of the term, consequently thirty days' notice must be by service of the citation thirty days before the first day of the court.

THE COURT refused to take up the case without consent, although thirty days had then (March 9, when the cause was called for hearing) elapsed since the service of the citation; and observed, that the case of Lloyd *v.* Alexander only decided that the court will not take up the case until thirty days have expired since the service of the citation; but it did not decide that the court would then take it up without consent.

RIDDLE & CO. *v.* MANDEVILLE AND JAMESSON.

The endorsee of a promissory note, in Virginia, may recover the amount from a remote endorsor, in equity, though not at law.

Equity will make that party *immediately* liable who is *ultimately* liable at law.

The remote endorsor has the same defence in equity against the remote endorsee as against his immediate endorsee.

The defendant has a right to insist that the other endorsors be made parties.

ERROR to the circuit court for the district of Columbia, sitting at Alexandria, in a suit in chancery, brought by Riddle & Co. against Mandeville and Jamesson, remote endorsors of a promissory note, dated March 2, 1798, at sixty days, for 1,500 dollars, drawn by Vincent Gray, payable to the defendants or order, and by them endorsed in blank. Upon its face it was declared to be negotiable in the bank of Alexandria. The note so drawn and endorsed was by Gray put into the hands of a broker who passed it to D. W. Scott for flour, which he sold for 1,200 dollars in cash, and paid the money to Gray. Scott passed it, without his own endorsement, to M'Clenachan in the purchase of flour, and M'Clenachan endorsed it to Riddle & Co. the complainants, in payment of a precedent debt; Gray failed to pay the note, and was discharged under the insolvent act of Virginia, upon an execution issued upon a judgment in favour of the complainants upon the same note. The complainants then brought a suit at law against the defendants upon their endorsement, and obtained judgment in the court below, which was reversed in this court, upon the principle that an endorsee cannot maintain a suit at law against a remote endorsor of a promissory note. 1 *Cranch*, 290. Whereupon the complainants brought the present bill in equity, which was decreed to be dismissed in the court below; that court being of opinion that there was no equity in the bill. From that decree the complainants appealed to this court.

The only facts stated in the bill were, that Gray made the note payable to the order of Mandeville and Jamesson, who put it in circulation. That it was afterwards delivered and transferred, for a valuable consideration, to M'Clenachan, who, for a

valuable consideration, endorsed and transferred it to the complainants. That Gray failed to pay it, and was discharged from execution under the insolvent act, whereby the complainants were unable to recover from him any part thereof; in consequence of which the defendants became liable in equity to pay the same, but have refused so to do.

Among the interrogatories contained in the bill, it is asked "with what view was the note made and endorsed?" and whether one of the defendants did not, upon inquiry, declare that the note was good, and would be punctually paid?

The defendants pleaded the judgment at law in their favour in a suit brought upon the same note, in bar of the relief in equity.

To this plea the complainants demurred, and the court sustained the demurrer, and ruled the defendants to answer.

The answer states, that the note was endorsed by them for the purpose of being discounted at bank for the use of the collector's office. in which Gray was the chief clerk or deputy, and had the whole management of the business. That the defendants refused to endorse it until Gray promised to deliver to the defendants, as security, their bond to the United States, given for duties, to the amount of 1,168 dollars, which he never did, and they had to pay it. That they never received any value from any person for their endorsement; that they never gave circulation to the note, otherwise than by endorsing it and delivering it to Gray to be discounted at bank, for which purpose only they endorsed it. They deny that they ever made any contract with any person touching the note, and say they have no recollection of any conversation with any person respecting the note before it became due.

The deposition of D. W. Scott stated, that he gave 200 barrels of flour for the note, but before he

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concluded the bargain, he asked Jamesson, one of the defendants, if the note was good, and whether there was any objection to it, and informed him it was offered to him for flour. Jamesson told him it was a good note, and observed that whenever he saw the name of Mandeville and Jamesson on any paper he might be sure it was good. That Scott sold the note to M'Clenachan for 207 barrels of flour, but did not endorse it, and it was expressly agreed that he should not be answerable for it in any event.

The deposition of M'Clenachan stated, that before he would take the note of Scott, he informed Jamesson that he intended to deal for it, and inquired whether it was an accommodation note, or a note given upon a real transaction. Jamesson told him it was a real transaction note, and not an accommodation note, and that it would be punctually paid. The deponent further stated, that the complainants had released to him all claim on account of the note, and of the debt intended to be paid by the note; and that he had also been discharged under the bankrupt act.

These witnesses were objected to by the defendants as interested.

E. J. Lee, for the plaintiffs in error.

1. The court below did right in overruling the plea in bar.

Where, by the principles of law, a party has a right, but the forms of law do not give a remedy, a court of equity will grant relief. *Mitf.* 103. And in some cases it has a concurrent jurisdiction with the courts of law. *Mitf.* 108, 109. 3 *Atk.* 215. 1 *Fonb.* 204.

2. The court below erred in dismissing the bill.

The plaintiffs are entitled to recover in equity against the defendants. It was the intention of the

defendants to make themselves responsible to any person who should be the holder of the paper. They intended it to be a negotiable instrument. This appears from the note itself, which is expressly made negotiable in the bank of Alexandria, and from the answer of the defendants, who state that they endorsed it for the purpose of being discounted at the bank. Their endorsement was intended to give credit to the note. If they did not intend to become responsible, they were guilty of a fraud. The complainants, upon the credit of the note, granted indulgence to M'Clenachan. The defendants were undoubtedly answerable at law to M'Clenachan. That liability was a *chose in action* which he had a right in equity to assign, although this court has decided that it was not assignable at law. 1 *Atk.* 124. 1 *Fonb.* 201. 204. 1 *Term Rep.* 622. In the case of *Violet* v. *Patton*, at this term, this court has decided that a person who endorses merely to give credit to the note, is liable at law to his immediate endorsee. If the complainants had brought a suit in the name of M'Clenachan for their use against the defendants, a court of law would have protected the equity of the complainants. 2 *Skin.* 6, 7. 1 *Term Rep.* 622. *Winch* v. *Keely.* 4 *Term Rep.* 341. And if in such a suit the defendants had a set-off against the complainants, *Riddle & Co.*, a court of law would have allowed it. 2 *H. Bla.* 1271. *Bottomly* v. *Brooke.* 1 *Term Rep.* 621. If a court of law will recognise and protect an equitable assignment, *à fortiori* will a court of equity. In the case of *Harris* v. *Johnston*, (*ante*, *vol.* 3. *p.* 319.) this court said that "the holder of a note may incontestably sue a remote endorsor in chancery, and compel payment of it."

Youngs, contra, contended,

1. That the plea in bar ought to have been sustained. A judgment at law against a party in an equitable action of *assumpsit*, when all the facts are susceptible of proof at law, is conclusive against the jurisdiction of a court of chancery, if it ever had any. If a court of chancery and a court of law

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have a concurrent jurisdiction, an election to proceed in one concludes the party from going into the other. If a person is under no legal obligation to pay money, a court of chancery cannot compel him. It can only enforce the performance of legal contracts, and where there is no contract at law, a court of chancery cannot make one. As no privity exists at law between the holder and a remote endorsor, that privity cannot be created by a court of equity.

2. That the court below was correct in dismissing the bill.

The contract was usurious. A note for 1,500 dollars having only sixty days to run was sold for 1,200 dollars worth of flour.

There was no valuable consideration flowing to the defendants; and such a consideration alone can make an endorsor liable even to his immediate endorsee.

The liability of the endorsor is not a complete *chose in action*. A *chose in action* is a right of action. No right of action exists against an endorsor of a promissory note, in Virginia, until it is ascertained that the money cannot be recovered from the maker. Until that time it is a mere possibility, which is not the subject of assignment even in equity. The liability of the endorsor is not assignable under the statute, and cannot be made so by a court of equity.

In the case of a joint obligation by principal and surety, if the surety be discharged at law, he can never be made liable in equity, for his equity is equal to that of the obligee. 2 *Wash.* 136. *Harrison* v. *Field.*

The note was endorsed by the defendants to be discounted at bank. Gray committed a breach of good faith, an act of fraud, in sending it into the market.

The complainants can only claim as creditors of M'Clenachan. But they are no longer his creditors, having released him from the debt, according to his own deposition which they have produced.

If it should be compared to a letter of credit, it is a letter of credit to a particular person for a particular purpose. It is not like a general letter of credit.

Swann and *C. Lee*, on the same side.

The suit at law was decided against the complainants on account of a defect of right, not for want of a remedy at law.

The money in the hands of Gray was like any other property in his hands. If it had been a horse which Mandeville and Jamesson had transferred to M'Clenachan, with warranty, and M'Clenachan had sold the horse to the complainants, he could not have transferred to them the warranty of Mandeville and Jamesson. No case can be found in which a suit in chancery has been maintained against a remote warrantor of personal property.

The complainants demand the whole amount of the note; but in equity they can claim only what they paid for it; and how much that was does not appear. The endorsors must sue each other in succession. No case can be found where a holder has recovered in equity against a remote endorsor.

C. Simms, in reply,

In the case of *Violet and Patton*, this court has placed the liability of an endorsor upon a much more correct principle than that of privity of contract. It was there decided, that an endorsement was equivalent to a general letter of credit; if so, it enables any one to recover upon it who has parted with his property upon the faith of it. If A. gives a letter

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of credit to C. and B. afterwards also gives a letter of credit to C., A. is not discharged from his liability because B. is also liable.

What was said by the chief justice in the case of *Harris* v. *Johnston*, cannot be considered as a mere *dictum*, but must be taken to be the deliberate opinion of the court, for it is the only answer given to a strong argument urged by the counsel for Johnston to show that the outstanding note was no bar to a recovery upon the open account, viz. that the defendant, being a remote endorsor, could never be compelled to pay the note. The answer of the court was, "It is supposed that the holder of a note may *incontestably* sue a remote endorsor in chancery, and compel payment of it." And during the argument of that case, when this idea was suggested by Mr. Jones, the chief justice said, "True; we shall consider that point. I have always been of opinion that in such cases a suit in chancery can be supported; though I do not recollect any case in which the point has been decided." When, therefore, the chief justice afterwards, in delivering the opinion of the court, repeats the same idea in stronger terms, it must be supposed that the point had been well considered, and that he spoke the opinion of the whole court.

March 13.

MARSHALL, Ch. J. delivered the opinion of the court as follows:

This suit is brought by the holder of a promissory note to recover its amount from a remote endorsor. In a suit between the same parties, this court had previously determined that the plaintiff was without remedy at law. It is now to be decided whether he is entitled to the aid of a court of equity.

If, as was stated by the counsel for the defendants, the question is, whether a court of chancery

would create contracts into which individuals had never entered, and decree the payment of money from persons who had never undertaken to pay it, the time of this court has been very much misapplied indeed in attending to the laborious discussion of this cause. The court would, at once, have disclaimed such a power, and have terminated so extraordinary a controversy.

But the real questions in the case are understood to be, whether the plaintiffs, as endorsees of a promissory note, have a right, under the laws of Virginia, to receive its amount from the endorsor on the insolvency of the maker; whether the defendants, as the original endorsors of the note, are ultimately responsible for it; and whether equity will decree the payment to be immediately made, by the person ultimately responsible, to the person who is actually entitled to receive the money.

This note came to the hands of M'Clenachan, endorsed in blank by Mandeville and Jamesson. M'Clenachan had a right to fill up the endorsement to himself, and he has done so. The law, as understood in Virginia, immediately implied an *assumpsit* from Mandeville and Jamesson to M'Clenachan to pay him the amount of the note, if he should use due diligence, and should be unable to obtain payment from the maker. M'Clenachan endorsed this note to the plaintiffs, and, by so doing, became liable to them in like manner as Mandeville and Jamesson were liable to him.

The maker having proved insolvent, the plaintiffs have a legal right to claim payment from M'Clenachan, and, on making that payment, M'Clenachan would be reinvested with all his original rights in the note, and would be entitled to demand payment from Mandeville and Jamesson.

If there were twenty successive endorsors of a note, this circuitous course might be pursued, and,

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by the time the ultimate endorsor was reached, the value of the note would be expended in the pursuit. This circumstance alone would afford a strong reason for enabling the holder to bring all the endorsors into that court which could, in a single decree, put an end to litigation. No principle adverse to such a proceeding is perceived. Its analogy to the familiar case of a suit in chancery by a creditor against the legatees of his debtor is not very remote. If an executor shall have distributed the estate of his testator, the creditor has an action at law against him, and he has his remedy against the legatees. The creditor has no action at law against the legatees. Yet it has never been understood that the creditor is compelled to resort to his legal remedy. He may bring the executor and legatees both before a court of chancery, which court will decree immediate payment from those who are ultimately bound. If the executor and his securities should be insolvent, so that a suit at law must be unproductive, the creditor would have no other remedy than in equity, and his right to the aid of that court could not be questioned.

If doubts of his right to sue in chancery could be entertained while the executor was solvent, none can exist after he had become insolvent. Yet the creditor would have no legal claim on the legatees, and could maintain no action at law against them. The right of the executor, however, may, in a court of equity, be asserted by the creditor, and, as the legatees would be ultimately responsible for his debt, equity will make them immediately responsible.

In the present case, as in that which has been stated, the insolvency of M'Clenachan furnishes strong additional motives for coming into a court of chancery. Mandeville and Jamesson are ultimately bound for this money, but the remedy at law is defeated by the bankruptcy of an intermediate endorsor. It is only a court of equity which can afford a remedy.

This subject may and ought to be contemplated in still another point of view. It has been repeatedly observed that the action against the endorsor is not given by statute. The contract on which the suit is maintained is not expressed, but is implied from the endorsement itself, unexplained and unaccompanied by any additional testimony. Such a contract must, of necessity, conform to the general understanding of the transaction. General opinion certainly attaches credit to a note, the maker of which is doubtful, in proportion to the credit of the endorsors, and two or more good endorsors are deemed superior to one. But if the last endorsor alone can be made responsible to the holder, then the preceding names are of no importance, and would add nothing to the credit of the note. But this general opinion is founded on the general understanding of the nature of the contract. The endorsor is understood to pass to the endorsee every right founded on the note which he himself possesses. Among these is his right against the prior endorsor. This right is founded on an implied contract, which is not, by law, assignable. Yet if it is capable of being transferred in equity, it vests, as an equitable interest, in the holder of the note. No reason is perceived why such an interest should not, as well as an interest in any other *chose in action*, be transferible in equity. And if it be so transferable, equity will of course afford a remedy. The defendant sustains no injury, for he may defend himself in equity against the holder as effectually as he could defend himself against his immediate assignee in a suit at law.

The case put, of the sale and delivery of a personal thing, is not thought to be analogous to this. The purchaser of a personal thing does not, at the time of the contract, look beyond the vendor. He does not trace the title. It passes by delivery. But suppose the vendor held it by a bill of sale containing a warranty of title, and should assign that bill to his vendee; is it clear that, on loss of the property for defect of title, no recourse could

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be had to the warrantor of that title? The court is not prepared to answer this question in the affirmative.

It is contended that the endorsee of the note holds it subject to every equity to which it was liable in the hands of the endorsor.

If this be admitted, it is not perceived that the admission would, in any manner, affect this case.

It is also contended that the plaintiff can only recover what he actually paid.

Without indicating any opinion on this point, the court considers it as very clear that the endorsement is *prima facie* evidence of having endorsed for full value, and it is incumbent on the defendant to show the real consideration, if it was an inadequate one.

Usury has been stated in the argument, but it is neither alleged in the pleadings, nor proved by the testimony.

It is urged that Mandeville and Jamesson are securities who have received no actual value, and that equity will not charge a security who is discharged at law. In support of this argument the case of a joint obligation is cited.

It is true, that, in the case of a joint obligation, the court has refused to set up the bond against the representatives of a security. But, in that case, the law had absolutely discharged them. In this case, Mandeville and Jamesson are not discharged. They are not released from the implied contract created by the endorsement. It is the legal remedy which is obstructed; the right is unimpaired, and the original obligation is in full force.

It is, then, the opinion of this court that, without referring to the depositions to which exceptions have been taken, a right exists in the holder of a pro-

missory note, at least where he cannot obtain payment at law, to sue a remote endorsor in equity.

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Certainly, in such a case, the defendant has a right to insist on the other endorsors being made parties, but he has not done so; and, in this case, the court does not perceive that M'Clenachan is a party so material in the cause, that a decree may not properly be made without him.

The decree is reversed, and the defendants directed to pay the amount of the note to the plaintiffs.

The decree of the court was as follows:

This cause came on to be heard on the transcript of the record of the circuit court for the county of Alexandria, and was argued by counsel. On consideration whereof, the court is of opinion, that the decree of the said circuit court, dismissing the bill of the plaintiffs, is erroneous, and ought to be reversed; and this court doth reverse the same; and this court, proceeding to give such decree as the said circuit court ought to have given, doth decree and order, that the defendants pay to the plaintiffs the sum of 1,500 dollars, that being the amount of the note in the bill mentioned, together with interest thereon from the time the same became due.

DULANY *v.* HODGKIN.

The endorsor of a promissory note, who endorses to give credit to the note, and who is counterseculedby property pledged, is not liable upon the

ERROR to the circuit court for the district of Columbia, sitting at Alexandria, in an action of *assumpsit* by the endorsee of a promissory note against his immediate endorsor. The note was made by Wellborn, on the 1st of January, 1806, for 200 dollars, payable to Hodgkin or order 120 days after date, negotiable at the bank of Alexandria. On the

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note, nor in an action for money had and received, unless the plaintiff show that the maker is insolvent, or that he has brought suit which has proved fruitless. It is not sufficient to show that the maker of the note is out of the reach of the process of the court.

trial, the plaintiff did not produce any evidence of a suit against the maker, nor evidence of his insolvency, but proved that the maker *never was an inhabitant of the district of Columbia*, but resided in Albemarle county, in the state of Virginia; whereupon the court, upon the prayer of the defendant, instructed the jury that it was still necessary for the plaintiff to prove, to the satisfaction of the jury, that he had brought suit upon the note against the maker, or that a suit against him would have been fruitless, before he could resort to the endorsor. To which instruction the plaintiff excepted.

The plaintiff also excepted to the refusal of the court to instruct the jury that if they should be satisfied by the evidence, that at the time the note was given, it was endorsed by the defendant with a view of giving credit to the maker with the plaintiff, and that it was so understood; and if they should be further satisfied by the evidence, that the maker left in the hands of the defendant funds to pay the note, or otherwise counter-secured him for becoming endorsor of the note, the plaintiff is entitled to recover in this action, although the maker should not be proved to have been insolvent before the note became due.

The declaration contained two counts; one upon the note, the other for money had and received.

The case was submitted, without argument, to the court, who, after inspecting the record, on the next day,

Affirmed the judgment, with costs.

YEATON *v.* FRY.

ERROR to the circuit court of the district of Columbia, in an action on the case upon a policy of insurance on the brig *Richard, at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk.* The following clause was inserted in the body of the policy. "*This insurance is declared to be made against all risks, blockaded ports and Hispaniola excepted.*" And at the foot of the policy was the following memorandum: "*Warranted* by the assured *free from any charge, damage or loss*, which may arise in consequence of *seizure* or *detention* of the property, *for or on account of illicit or prohibited trade.*"

If the insurance be "against all risks, *blockaded ports and Hispaniola excepted*," a vessel sailing ignorantly for a blockaded port is covered by the policy.

The exception is not of the *port*, but of the *risk of capture* for breaking the blockade.

On the trial of the general issue, four bills of exception were taken in the court below by the plaintiff in error.

Copies of the proceedings in the vice-admiralty court of Jamaica are admissible in evidence when certified under the seal of the court by the deputy registrar, who is certified by the judge of the court, who is certified by a notary public.

1. The first was to the admission in evidence of certain copies of the proceedings and decree of the vice-admiralty court at Jamaica, ordering a sale to pay the salvage of the brig. The copies were authenticated by the following certificates, viz. "Jamaica, *ss.* I, Adam Dolmage, Esq. deputy of Owsley Rowley, Esq. chief registrar and scribe of the acts, causes and businesses of the court of vice-admiralty within the said island, duly constituted, appointed and sworn, do hereby certify and make known to all whom it doth or may concern, that the several sheets of paper writing hereunto annexed, in number fifteen, and marked or numbered from No. 1. to No. 15. inclusive, do contain a true copy and transcript of certain process and proceedings, had, moved, and prosecuted to interlocutory decree in the said court, in a certain cause therein lately depending, entitled, "Brig Richard, Jacobs, master." In which cause Benjamin Jacobs hath duly

Depositions, taken under a commission issued at the instance of the *defendant*, may be read in evidence by the *plaintiff*, although the plaintiff had not notice of the time and place of taking the same.

A vessel sailing ignorantly

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to a blockaded port, is not liable to capture under the law of nations.

filed his claim thereto in the said court; and I further certify, that I have carefully compared and examined the same with the originals remaining of record in my office.

"In faith and testimony of the truth whereof, I the said Adam Dolmage have hereunto set my hand; and the seal of the said court of vice-admiralty hath been caused to be hereunto affixed in the city of Kingston, in the said island, the seventh day of January, one thousand, eight hundred and seven.

"ADM. DOLMAGE, *Dep. Reg. Vic. Cur. Adm.*"

"Jamaica, *ss.* I, Henry John Hinchliffe, Esq. judge and commissary of the court of vice-admiralty, in the island of Jamaica, do hereby certify and make known to all whom it may concern, that Adam Dolmage, Esq. who has signed and attested the certificate hereunto annexed, is deputy registrar of the said court of vice-admiralty, and that to all acts and instruments by him signed and attested, in such his capacity, due faith and credit is and ought to be given in judgment, court, and without. In testimony whereof, I have hereunto set my hand, and caused the seal of the court of vice-admiralty aforesaid to be affixed, this sixteenth day of September, 1807.

(Seal.) "Henry John Hinchliffe."

"Jamaica, *ss.* I, Robert Robertson, secretary, and notary public, of this his majesty's island of Jamaica, duly admitted, allowed and sworn, dwelling in the city of Kingston, in the county of Surrey, and island aforesaid, do hereby certify and make known to all whom these presents may concern, that Henry John Hinchliffe, Esq. by whom the annexed certificate is signed, is judge and commissary of the court of vice-admiralty of the island of Jamaica aforesaid, and that to all acts and instruments in writing by him the said Henry John Hinchliffe, Esq. attested, due faith and credit is and ought to be given. In testimony whereof, I, the said notary, have here-

unto affixed my hand and seal of office, at Kingston aforesaid, this fifth day of October, *Anno Domini* one thousand, eight hundred and seven.

(Seal.) "Rob. Robertson, Sec. and N. Pub."

It was further testified by competent witnesses, examined upon oath by the court, that the said Henry J. Hinchliffe, in the year 1804, publicly sat as a judge of, and held the court of vice-admiralty in Jamaica, and in that capacity condemned the vessel of one of the witnesses, who, in the island of Jamaica, received from his proctor a copy of the proceedings in the said court in his cause, which copy was authenticated in the same manner as the paper now offered in evidence, and under a similar seal; and that upon producing that copy to the underwriters in Alexandria and in Philadelphia, the loss was paid without delay. That similar papers, purporting to be copies of proceedings in the same court of vice-admiralty in other cases, had been received in this country by other persons, and had been considered by both insurers and insured as authentic papers, and losses had been paid thereon; and that the present paper was shown to the defendant, who did not object to its authentication, but refused to pay the loss for other reasons. But neither of the witnesses had ever seen the judge write, nor the act of affixing the seal of the court to any paper.

2. The second bill of exceptions stated, in substance, that the defendant (the plaintiff in error) prayed the court to instruct the jury, that if at the time the brig Richard sailed from Tobago for Curraçoa, the latter island was actually blockaded, and the brig turned away by the blockading force, and afterwards lost, without again attempting to enter Curraçoa, and in the prosecution of her voyage to Norfolk, the plaintiff below was not entitled to recover, although no official notification of such blockade was ever published, and although the master of the brig was ignorant of such blockade

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until he met with the blockading force. Which instruction the court refused to give.

3. The third bill of exceptions stated, that the plaintiff below offered to read in evidence certain depositions taken in Tobago, under a commission issued at the instance of the *defendant*, and the court, being satisfied that the plaintiff's attorney had agreed to receive, and did receive and transmit to the plaintiff, notice of the time and place of taking such depositions, suffered the plaintiff to read them in evidence to the jury.

4. The fourth bill of exceptions was to the opinion of the court given to the jury at the request of the plaintiff, that if at the time the brig sailed from Tobago for Curraçoa the latter island was not a blockaded port by notification of the British government to the American nation, but was blockaded in fact, and if the master was ignorant of such blockade until he was warned off by the blockading force, and being so warned he did not again attempt to enter the blockaded port, but changed his course intending to come directly to Norfolk, and in the prosecution of such voyage to Norfolk was captured by a French cruiser, and recaptured by an English vessel, carried into Jamaica, libelled, condemned and sold under a decree of the vice-admiralty court of that island, then such sailing from Tobago for Curraçoa, and from thence to Norfolk, was a lawful voyage within the meaning of the contract of insurance, and not within the exception in the policy, and the plaintiff was entitled to recover against the underwriters an indemnity for the loss sustained by such capture, recapture and sale.

Youngs, for the plaintiff in error, contended,

1. That blockaded ports were absolutely excepted from the policy, and, consequently, there was no insurance if the vessel sailed for a blockaded port. The exception amounts to a warranty that the vessel shall not sail for a blockaded port; and the insu-

red takes upon himself the chance of the port being blockaded. *Park*, 322. 367. *Kenyon* v. *Berthow*.

2. That the copy of the proceedings of the court of vice-admiralty, at Jamaica, was not sufficiently authenticated to be admitted in evidence. The act of congress does not designate any mode of authentication of foreign papers, but has left that subject entirely to the state legislatures. As the court below was sitting at Alexandria, it ought to have been governed by the act of assembly of Virginia of December 8, 1792, (*Revised Code*, 168. *fol. ed.*) which requires, besides the attestation of a notary public, "*a testimonial* from the proper officer of the city, county, corporation, or borough where such notary public shall reside, or the *great seal* of such state, kingdom, province, island, colony, or place beyond sea."

In the case of *Church* v. *Hubbart*, 2 *Cranch*, 238. this court said, that foreign judgments were to be authenticated, either by an exemplification under the great seal, or by a proved copy, or by the certificate of an officer authorized by law, which *certificate itself* must be *properly* authenticated. The *proper* authentication, under the laws of Virginia, is the *testimonial* mentioned in the act of assembly, or the *great seal* of the colony or island.

3. With regard to the depositions taken on behalf of the defendant, and which the plaintiff wished to use on the trial, they ought not to have been read for the plaintiff, because they had not been taken in such a manner as to authorize the defendant to use them against the plaintiff.

This court has determined that notice to an attorney at law is not such notice as is required by the act of assembly of Virginia, for taking depositions, and the attorney could not admit, or waive notice but upon record.

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E. J. Lee and *C. Lee*, contra, were stopped by the court as to the first point.

2. As to the copy of the proceedings in the court of vice-admiralty, they took a distinction between the proceedings of municipal courts, and courts of the law of nations. The seals of courts of admiralty, in cases under the law of nations, are admitted in evidence without further authentication, because they are courts of the whole civilized world, and every person interested is a party. 1 *Rob.* 296. *The Maria. Gilb. Law of Ev.* 22, 23. This was admitted by the counsel on both sides in the case of *Church* v. *Hubbart*, referred to by the opposite counsel.

Besides, these proceedings are authenticated in the manner provided by the 19th article of the British treaty of 1794.

Jones, in reply.

The exception in the policy was not intended merely to exclude the *risk* of attempting to enter a blockaded port, but excluded *all* risks if the vessel should sail for a port actually blockaded. The trade with a blockaded port is an illegal trade, and there is an express warranty at the foot of the policy against all losses arising from seizure for or on account of illicit or prohibited trade. The exception, therefore, must have been intended to provide for something else. Can it be contended that if the vessel had sailed for Hispaniola, the underwriters would have been liable for a loss, happening in any manner whatsoever? Yet blockaded ports and Hispaniola are equally excepted, and in the very same words. A voyage to such a port is as much excluded from the policy as a voyage to Hispaniola. The exclusion of particular ports amounts to a warranty that the vessel shall not sail to such ports; and if a warranty be not complied with, the underwriters are not bound, whatever may be the cause of the

non-compliance, and whether the loss happened in consequence of such non-compliance, or not. It is a condition precedent; and an innocent, an ignorant, or a compulsive violation of a warranty, however immaterial, avoids the contract of insurance. *Park*, 318. 326. 363. 369. *Marshall*, 348. 354.

March 13.

MARSHALL, Ch. J. delivered the opinion of the court as follows, viz.

The material question in this case grows out of an exception in a policy of insurance.

The plaintiff insured a specified sum on the brig Richard, belonging to the defendant, "at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk;" and the insurance is declared to be made against "*all risks*, blockaded ports and Hispaniola excepted."

The Richard sailed from Tobago for Curraçoa, which was then blockaded in fact, but the blockade was not known at Tobago when the vessel sailed, nor was it known to the captain until he was warned off by a British ship of war. He then sailed for Norfolk; but on his voyage was captured by a French privateer, by whom the vessel was plundered to a considerable extent, and ordered to St. Domingo for trial.

The question is, whether this risk comes within the exception contained in the policy.

The counsel has considered the exception as a warranty; but the court cannot so consider it. The words are the words of the insurer, not of the insured; and they take a particular risk out of the policy which, but for the exception, would be comprehended in the contract.

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What is that risk?

Policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed, in order to effect the real intention of the parties, if that intention can be clearly ascertained.

In that part of the policy on which the present controversy depends, a few words are given, to which others must be subjoined in order to complete the sense, and give a full description of the risk against which the underwriters were unwilling to insure. These words are, "blockaded ports and Hispaniola excepted."

It is reasonable to suppose that a voyage to Hispaniola was not insured. The assured has notice of this, and if he sails for Hispaniola, the voyage is entirely at his own risk. Against the risks of such a voyage, whatever they may be, the underwriters will not insure. It is a specified place, excluded, by consent, from the policy. The perils attending the voyage are understood, whether they arise from the sea, or otherwise, and are all excepted. The motives for making the exception do not appear, nor can they be inferred from the instrument.

The plaintiff in error contends that the same reasoning applies, in its full extent, to the exception of blockaded ports; but the court does not think so.

Hispaniola is excepted absolutely from the policy; but other ports are within the terms of the voyage insured, if they be not blockaded. It is their character, as blockaded ports, which excludes them from the insurance. Their being excepted by this character is thought to justify the opinion, that it is the risk attending this character which produces the exception, and which is the risk excepted. The risk of a blockaded port, as a blockaded port, is the risk incurred by breaking the blockade. This is defined

by public law. Sailing from Tobago for Curraçoa, knowing Curraçoa to be blockaded, would have incurred this risk, but sailing for that port, without such knowledge, did not incur it.

The underwriter had no objection to a voyage to Curraçoa, other than might arise from its being blockaded. The dangers of the blockade, therefore, were the particular dangers which induced the exception, and it seems to the court that the exception ought not to be extended beyond them. If this be correct, the circuit court committed no error in refusing to give the opinion which was required by the counsel on this point.

The sentence in this case is sufficiently authenticated to be received as evidence. Being a court acting under the law of nations, its proceedings may be proved according to the mode observed in the present case; and were this doubtful, that doubt would be removed by the circumstance that it is the form stipulated by treaty.

The defendant is not at liberty to except to his own depositions, because he does not produce proof of his having given notice to the plaintiff. The admission of notice by the plaintiff is certainly sufficient, if notice to him was necessary, to enable him to use the defendant's deposition.

The fourth bill of exceptions depends on the principles stated by the court, in the first part of this opinion.

There is no error in the judgment of the circuit court, and it is *affirmed*, *with costs*.

OWINGS *v.* NORWOOD'S LESSEE.

In an action of ejectment between two citizens of Maryland, for a tract of land in Maryland, if the defendant set up an outstanding title in a British subject which he contends is protected by the treaty, and therefore the title is of the plaintiff; and the highest state court in Maryland decides against the title thus set up; it is not a case in which a writ of error can lie to the supreme court of the United States.

It is not "*a case arising under a treaty.*" The judiciary act must be restrained by the constitution of the United States.

ERROR to the court of appeals of Maryland, being the highest court of law and equity in that state, in an action of ejectment brought by the defendant against the plaintiff in error, both parties being citizens of Maryland, for a tract of land in Baltimore county, called "*The Discovery*," being part of a tract of land called Brown's Adventure, originally patented for 1,000 acres to Thomas Brown, in the year 1695, who conveyed to John Gadsby, who conveyed to Aaron Rawlins in 1703, who mortgaged in fee to Jonathan Scarth, a London merchant, by deed of bargain and sale, in 1706, with a proviso to be void upon payment of 800*l.* sterling, with interest, on the 13th of May, 1709. Scarth and his heirs were always British subjects resident in England, and never were in Maryland; but Scarth was charged with the quit-rents, in the Lord Proprietor's debt-books, up to the time of the revolution. Rawlins, however, by his will, in 1741, devised the land specifically to some of his children, without taking any notice of the mortgage. In 1732, Littleton Waters attached, and obtained judgment of condemnation against the land, for a debt due to him from *Scarth*, but never took out any execution upon the judgment; and by deed of lease and release assigned all his right in the land to the Baltimore company, under whom the plaintiff in error claims.

In October, 1794, Norwood obtained an escheat warrant to affect the tract called Brown's Adventure, upon suggestion of a defect of heirs of Brown, the original patentee. In June, 1800, he obtained a patent from the state founded upon the proceedings under that warrant, for 520 1-2 acres, being part of Brown's Adventure, with an addition of 26 acres of vacant land, and thereupon brought his action of ejectment against Owings. Upon the trial the original defend-

ant, in order to show an existing title out of the plaintiff, contended that the mortgage to Scarth was protected from confiscation by the British treaty of 1794, and was still a security for the money to the representatives of Scarth, who were proved to be still living in England. "But the court were of opinion that on the expiration of the time limited in the mortgage for the payment of the money, a complete legal estate of inheritance vested in the mortgagee liable to confiscation; and was vested in the state by virtue of the act of confiscation of *October session*, 1780, *c.* 45. and the act of the same session, (*c.* 49.) (*to appoint commissioners*,) subject to the right of redemption in the mortgagor and his heirs, and that the British treaty cannot operate to affect the plaintiff's right to recover in this ejectment."

The verdict and judgment of the general court being affirmed in the court of appeals of Maryland, and being against the right claimed under the treaty, Owings sued out his writ of error under the provisions of the 25th section of the judicary act, *vol.* 1. *p.* 63. which enacts, that a final judgment in the highest court of a state, in a suit "where is drawn in question the construction of any clause of a treaty, and the decision is against the right claimed under such clause of the treaty, may be re-examined and reversed or affirmed in the supreme court of the United States."

Harper, for the plaintiff in error.

The question in this case is, whether Scarth's interest in the land was protected by the treaty of peace with Great Britain. By the 5th article of that treaty "it is agreed that all persons who have any interest in confiscated lands, either by *debts*, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." The case of *Higginson and Mein*, decided by this court, (*ante*, *vol.* 4. *p.* 415.) was, in substance, the same as this. In both, the time of payment had passed before the confiscation; and the legal estate

was in a British subject. The court in that case decided that the confiscation did not destroy the lien which the British creditor had in the land under the mortgage.

LIVINGSTON, J. Could the mortgagor, sixty or seventy years after the time of payment, maintain a bill to redeem?

Harper. The mortgagee never was in possession of the land; the lapse of time, therefore, would rather operate as a bar to foreclosure than redemption.

Ridgely, contra.

By the act of assembly of Maryland, passed at October session, 1780, *c.* 45. and *c.* 49. all the property in that state belonging to British subjects, *except debts*, was confiscated and *vested* in the state, without inquest of office, or entry, or any other act to be done. The statute operated a complete change of property and possession.

This was not at that time a debt due to Scarth. Nearly a century had elapsed since the mortgage was forfeited. There was no covenant in the mortgage for payment of the money; no bond taken, or other evidence of a debt. Rawlins never took any measures to redeem, but abandoned the pledge, as an absolute sale. It is a general principle in equity that the mortgagor shall not redeem if the mortgagee has been in possession twenty years after forfeiture of the mortgage. It was not necessary for Scarth to file a bill to *foreclose;* because the right to redeem was barred by his twenty years' possession. If Rawlins could not have redeemed in 1780, the estate was absolute in Scarth, and the confiscation was complete. There is no case in England, or Maryland, where the mortgagor has been permitted to redeem after twenty years, if no interest has been paid, or account kept between the parties. *Pow. on Mort.* 152. 3 *P. Wms.* 287. 2 *Atk.* 496. 2 *Vern.*

418. 3 *Bac. Abr.* 655. 1 *P. Wms.* 272. 15 *Vin.* 467.

But if Scarth's heirs might avail themselves of the treaty, it is not competent for a third person to set it up. Or if it is, it will not give this court jurisdiction.

Johnson, Attorney-General of Maryland, on the same side

If the judgment below be not against a right claimed under the treaty, if it be not a case arising under the treaty, this court has no jurisdiction.

In this case Owings claims no right under the treaty. Scarth's right, whatever it may be, is not affected by the decision of this case. It is he only who could claim the benefit of the treaty. But he is not a party in the suit. It is, therefore, not a case arising under the treaty.

MARSHALL, Ch. J. There are only two points in this case.

1. Whether Scarth had such an interest as was protected by the treaty; and,

2. Whether the present case be a case arising under a treaty, within the meaning of the constitution.

This court has no doubt upon either point.

The interest by debt intended to be protected by the treaty, must be an interest holden as a security for money at the time of the treaty; and the debt must still remain due.

The 25th section of the judiciary act must be restrained by the constitution, the words of which are, "all cases arising under *treaties*." The plaintiff in error does not contend that his right grows out of

the treaty. Whether it is an obstacle to the plaintiff's recovery is a question exclusively for the decision of the courts of Maryland.

Harper, on the next day, having suggested to the court that he understood the opinion to be that this court had no jurisdiction to revise the decisions of the state courts, in cases where the construction of a treaty was drawn in question *incidentally*, and where the party himself did not claim title under a treaty, was about to make some further observations on those points, when

MARSHALL, Ch. J. observed, that Mr. Harper had misunderstood the opinion of the court, in that respect. It was not that this court had not jurisdiction if the treaty were drawn in question *incidentally*.

The reason for inserting that clause in the constitution was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals. It was to avoid the apprehension as well as the danger of state prejudices. The words of the constitution are, "*cases arising under treaties*." Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by the treaty. If Scarth or his heirs had claimed, it would have been a case arising under a treaty. But neither the title of Scarth, nor of any person claiming under him, can be affected by the decision of this cause.

Harper. The opinion is more limited than I apprehended. But in this case the land is claimed as confiscated, and the question is, whether the plain-

tiff's title, by confiscation, is good under the treaty. The defendant has a good title against every body who cannot show a better. He has a right to protect himself, by showing that the plaintiff has no title. In order to do this, he insists that the title of the plaintiff is inconsistent with the treaty. He has a right to set up the treaty in opposition to the confiscating act of Maryland.

Martin, on the same side.

The reason of the clause in the constitution was, that there might be uniformity of decision upon all questions arising upon the construction of the constitution, and laws and treaties of the United States. In every case, the question concerning a treaty must come on incidentally. The intention was, that wherever a state court should decide against a claim, set up under the construction of a treaty, such decision should be examinable in this court.

This was the cotemporaneous exposition given to the constitution by the first congress, convened under that constitution, and which was composed of a great number of the leading members of the convention by which the constitution was framed; and who must have well known what was the intention of that body in adopting that article.

The right of the plaintiff to recover in this suit, and the right of the defendant to retain the possession as against this plaintiff, depend upon the treaty.

The property having been once granted, the state could not again acquire the title but by escheat or confiscation. The court below decided, that it was not a case of escheat, because the heirs of Scarth were living. Whether the property was confiscated within the meaning of the treaty, is therefore the only remaining question upon the merits of the case. That question, however, is not before this court, until this court shall decide whether they are

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competent to consider it in this case. We consider the judiciary act as a correct exposition of the constitution in this respect, and that this is clearly a case within the provisions of the 25th section of that act.

This argument produced no alteration in the opinion of the court; and the

Writ of error was dismissed.*

* As this cause occupied a considerable portion of the time and talents of the courts and bar of Maryland, and as it decided several important points in that state, it is deemed not improper to give a short abstract of the case as it appears in the bills of exception.

Upon the trial, the defendant Owings took 10 bills of exception.

The 1st bill of exceptions stated that the plaintiff offered in evidence a patent from the lord proprietor of Maryland to Thomas Brown, dated November 10, 1695, for a tract of land called Brown's Adventure, containing 1,000 acres. Also a patent from the state of Maryland to Edward Norwood, the original plaintiff in this action, dated 25th June, 1800, for a tract of land called "*The Discovery*," containing 520 1-2 acres, included within the lines of Brown's Adventure. The defendant offered evidence that the heirs of Brown, the original patentee, were still living in Maryland. The defendant offered in evidence a deed from Brown to Gadsby, dated May 2, 1700, on which was an endorsement dated May 4, 1699, purporting to be a receipt for the alienation fine due to the lord proprietor. And the following "Memorandum: That the date of this was originally according to the date of the above receipt, but altered by consent of the provincial court and parties, to bring it within the act of assembly.

"W. TAYLARD."

Whereupon the defendant prayed the court to instruct the jury that if they were of opinion that the endorsements were made at the request of Gadsby the grantee, and with his privity and consent, and that the deed with the endorsements was recorded for his benefit, and with his assent, then the endorsements are competent to be read in evidence to support the facts therein contained against the title of Gadsby to the lands in the deed mentioned. But the court was of opinion that the memorandum of *Taylard* "was not evidence, *being an act done by the said W. Taylard without authority*, and that the said deed was valid and operative in law to transfer the said land to the said Gadsby."

The 2d bill of exceptions states that, in addition to the above evidence, the plaintiff offered in evidence a deed from Gadsby to Barker, for 130 acres, part of Brown's Adventure, dated 10th of July, 1701. Also a deed from Gadsby to Aaron Rawlins of the residue of Brown's Adventure, dated 2d of October 1703. Also a deed of mortgage in fee from Rawlins to Jonathan Scarth, dated the 13th of May, 1706. He also offered evidence that Barker and Scarth died before 1795, without heirs. Also an *escheat* warrant to the plaintiff, dated 28th of October, 1795, and a certificate of resurvey, and a patent thereupon to the plain-

MOSS *v.* RIDDLE & CO.

ERROR to the circuit court for the district of Columbia, in an action of debt upon the joint bond of Welsh and Moss for the payment of money.

A bond cannot be delivered to one of the obligees as an *escrow*.

Fraud consists in *intention;* and that intention is a fact which must be averred in a plea of fraud.

Welsh, who was the principal debtor, not being found in, and not being an inhabitant of, the district of Columbia, the suit abated as to him.

The defendant Moss, in his *first* plea, after profert, dated 25th of June, 1800. The plaintiff also offered evidence, that the lands are truly located on the plats as directed by the plaintiff. The defendant offered evidence that the heirs of Brown were still living in Maryland; that Scarth's heirs are still living in England, and that he and his heirs were always British subjects, and always resided in England.

The court had directed the jury that if the heirs of Scarth were living in England at the passage of the acts of *October session*, 1780, *c.* 45 *c.* 49. *and c.* 51. the warrant of escheat which issued to the plaintiff, issued without authority of law, but that a patent which issued on such a warrant came within the provision of the act of *November session*, 1781, *c.* 20 *s.* 8. whereupon the defendant offered in evidence the valuation of the land so escheated by the plaintiff, and the sum by him paid into the treasury for the said lands on the *24th of December*, 1799, and that the sum so paid, was only two thirds of the appraised value of the said lands so escheated, and prayed the direction of the court, that if the jury should be of opinion that the plaintiff had paid only two thirds of the appraised value, he could not entitle himself to the benefit of the warranty contained in the act of *November*, 1781, *c.* 20. *s.* 8 "But the court were of opinion, that if the jury should find the facts as stated, the said patent was good, valid and operative in law to pass the said land to the said Edward Norwood and his heirs, and so directed the jury, notwithstanding the said Edward Norwood had not paid more than two thirds of the appraised value of the said land. The court considering the case of the said Edward Norwood as coming fully within the provision of the *8th sect.* of the act of *November session*, 1781, *c.* 20. and that the two thirds of the value of the said land was as much as the said Edward Norwood was liable to pay; to which last opinion, and to so much of the former opinion as declares the said patent to come within the provisions of the act of *November*, 1781, *c.* 20. § 8. the defendant excepted."

The 3d bill of exceptions, in addition to the foregoing evidence, stated, that the defendant offered evidence of a judgment of condemnation of these lands upon an attachment from the provincial court in 1732, for a debt of 397*l.* 9*s.* 6*d.* sterling, due from Scarth to one Littleton Waters. The plaintiff offered in evidence duplicate writs of attachment to other counties issued by Waters for the same debt, upon which sundry sums of money were attached and condemned in the hands of garnishees, amounting altogether to 226*l.* 8*s.* 4*d.* sterling.

Moss v. Riddle.

testing that he did not deliver to any person, unconditionally, as his act and deed, the writing in the declaration mentioned, averred that he signed and

To show that the lands attached by Waters was the 386 acres located on the plats as being in the possession of the Baltimore company, the plaintiff read in evidence the lord proprietor's old rent-roll, stating 870 acres to be in possession of Rawlins, and 130 in the possession of John Barker. And the last rent-roll stating 419 acres to be in possession of Search, and 385 in the possession of Charles Carroll & Co.; and the lord proprietor's debt-book for the year 1754, (being the oldest book of that kind remaining,) which charges the Baltimore company with the quit-rents of 386 acres and no more, and Search with 419; which charges were continued annually until the revolution. And the defendant thereupon prayed the opinion of the court, that by virtue of the said judgment and attachment and condemnation by him given in evidence, a legal estate was vested in the said Littleton Waters in the said tract of land called Brown's Adventure. But the court were of opinion, and so directed the jury, that the said Littleton Waters did not acquire a legal estate in the said land by virtue of the said judgment, attachment and condemnation.

The 4th bill of exceptions stated the same facts, and further that the defendant read the act of assembly passed at November session, 1797, c. 119. and prayed the opinion of the court, that by virtue of that act the right of the state was so far vested in the persons possessing the land called Brown's Adventure under the condemnation aforesaid, that the plaintiff could not in virtue of his said warrant, certificate and patent have any right or title to the said land; or, if any, then no more than the proportion or compensation to which a discoverer of confiscated property is entitled. But the court were of opinion that the right of the plaintiff to Brown's Adventure attached upon his obtaining the warrant of escheat, and that his right was saved and protected by the proviso in the 2d section of the said act of November, 1797, c. 119. And that the grant transferred to him the interest the state had in the land called "*The Discovery*" from the time of his obtention of his said warrant of escheat.

The 5th bill of exceptions states the same facts, whereupon the defendant prayed the opinion of the court, and their direction to the jury, that if the warrant of escheat which issued in this case, issued without authority of law, then the warranty contained in the act of November, 1781, c. 20. § 8. did not operate to give title to the plaintiff, and that there can be no relation to a warrant which issues without authority of law, or to a certificate made in pursuance of such warrant.

But the court were of opinion, that the act of 1781, c. 20. § 8. did secure to the plaintiff the said land so by him escheated on his paying two thirds of the value of the said land, being what the plaintiff was liable to pay for the same as confiscated British property; and that the grant obtained by the plaintiff did operate to pass the land to him by relation from the date of the said warrant.

The 6th bill of exceptions also stated the same facts, and that the defendant thereupon prayed the court to direct the jury that if the said tract of land called Brown's Adventure belonged to a British subject at the time of passing the act for confiscating British property in the state of Maryland, and if no actual possession had been taken thereof by the said state or its agents, and no sale or disposition made

sealed the same, and delivered it to *Joseph Riddle*, *one of the plaintiffs*, *as an escrow*, to be his act and deed, on condition that the same should afterwards

thereof by the state to any person at any time before the treaty between the United States and Great Britain dated the 19th of November, 1794, took effect, the plaintiff could make no title thereto by his said warrant, certificate and patent.

But the court refused to give that direction to the jury, being of opinion, that the state of Maryland, by their commissioners, was in possession of all British property within the limits of the said state, under and by virtue of the act of confiscation, October, 1780, c. 45. and the act of the same session, c. 49. to appoint commissioners, &c. And that the possession of the said land was in the state of Maryland at the time the plaintiff obtained his escheat warrant; and that no British subject could hold land in the state of Maryland on the 19th of November, 1794, the time when the treaty was entered into between the United States and Great Britain.

The 7th bill of exceptions, in addition to the facts before mentioned, stated, that the defendant offered evidence that the heirs of Rawlins were still living in Maryland. That Rawlins, in the year 1741, made his will and devised Brown's Adventure by name to some of his children. That the heirs of Littleton Waters are still living in Maryland. That the Baltimore company, under whom the defendant claims, have been for fifty years past in the actual possession and user of the whole land called Brown's Adventure, by clearing and cutting the wood off the said land for their iron works, and claiming the said land; and that there has been no actual or mixed possession of any part of the said land by *Scarth*, or by any person claiming under him, or by any person claiming adversely to the Baltimore company. Whereupon the defendant prayed the court to direct the jury, that if they find the facts stated by the defendant to be true, and that no payment of principal or interest due on the said mortgage, or acknowldgement of the said mortgage, was at any time paid, made or done, on or after the 15th of May, 1709, the jury may and ought to presume the said mortgage satisfied before the year 1780, and that the plaintiff is not entitled to recover. But the court were of opinion that the facts stated in the above case will not warrant the jury in presuming the said mortgage was satisfied before the year 1780, and refused to give the direction prayed.

The 8th bill of exceptions states the same facts, and that the defendant further prayed the court to direct the jury, that if the facts are found true as stated by the defendant, the act of confiscation of October session, 1780, c. 45. and c. 49. vested no beneficial interest in the state of Maryland in the lands in the mortgage from Rawlins to Scarth, but that the same, if it vested in the state under the act of confiscation, was liable to the equity of redemption in the heirs of Rawlins the mortgagor, and that by operation of the British treaty, so far as the mortgagee could claim an interest in the said mortgaged lands, the same was saved from confiscation by the said treaty, and, consequently, the lessor of the plaintiff is not entitled to recover.

But the court were of opinion, that on the expiration of the time limited in the mortgage for the payment of the money, a complete legal estate of inheritance vested in the mortgagee liable to confiscation, and was vested in the state in virtue of the act of confiscation of October session, 1780, c. 45. and the act of the same

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be signed, sealed and delivered by some other friend of Welsh, which was not done, and so the said writing is void as to him the said Moss.

To this plea the plaintiffs demurred specially; 1st. Because a bond cannot be delivered to the obligee himself as an *escrow;* 2d. Because the plea does not state by what other friend of Welsh it was to have been executed; 3d. Because it did not state by whom the execution of the bond, by that other friend was to have been procured, leaving it uncertain whether the condition upon which it was to become the deed of Moss was to be performed by him, or by Riddle, or by Welsh; 4. Because the plea is repugnant, inconsistent and informal. The *second* plea, after protesting as in the first plea, avers, that Riddle came to the defendant and asked him whether Welsh had not applied to him, Moss, to be his security for a debt due to Riddle & Co.; to which Moss replied he had told Welsh he would not be security alone, but would join Welsh and some other friend of his as security for the debt, whereupon Riddle represented that the greatest confidence was placed in Welsh; that

session, c. 49. to appoint commissioners, subject to the right of redemption in the mortgagor and his heirs, and that the British treaty cannot operate to affect the plaintiff's right to recover in this ejectment, and refused to give the direction prayed.

The 9th bill of exceptions, in addition to the same facts, states, that the defendant offered in evidence a lease and release from Littleton Waters to Benjamin Tasker and others, dated June 20, and 21, 1738, of so much of Brown's Adventure as, according to a valuation upon oath returned to the provincial court, would amount to 145*l.* 1*s.* 5*d.* sterling, and thereupon prayed the court to instruct the jury, that if they find the facts as stated by the defendant, the deeds of lease and release from Waters to Tasker and others conveyed a legal title in the lands therein mentioned; and that if a legal title did not pass, then the jury may and ought to presume a title in the said Tasker and others to the whole of an undivided 386 acres of land, being an undivided part of the 870 acres of land mortgaged to Jonathan Scarth, called Brown's Adventure. But the court refused to give the direction prayed.

The 10th bill of exceptions states, that upon the same facts the defendant prayed the court to direct the jury that as to all that part of Brown's Adventure contained in the deed from Waters to Tasker and others, under whom the defendant claims, the patent granted to the plaintiff does not give him a title thereto, or enable him to recover the same, which direction the court refused to give.

the partnership of Riddle & Co. was about to be dissolved; that Riddle would take care to keep that paper, if it was executed, in his dividend of the debts; that Welsh and Moss might sign the bond at that time, and some other person might sign it afterwards; that in regard to the debt he would look only to Welsh, and would also give Welsh a credit for goods, when he, Riddle, should open and commence business on his private and individual account. The plea further avers, that Moss being induced by that representation and promise, did sign, seal and deliver the writing, upon condition that some other friend of the said Welsh should also sign, seal and deliver the same, and not otherwise; which was never done. That Riddle did afterwards carry on trade and merchandise, on his own separate and individual account, but never afterwards credited Welsh with any goods or merchandise; "and *so* the said writing made and executed as aforesaid is void as to him the said Robert Moss."

To this plea the plaintiff also demurred specially, for the causes stated in the first demurrer; and further, because the plea is multifarious, argumentative, and offers to put in issue a number of matters unconnected with the defence set up, and immaterial in themselves.

The court below gave judgment for the plaintiffs upon both demurrers.

Before the judgment was entered by the clerk, the defendant below prayed leave to amend his first plea, by striking out the words "delivered to Joseph Riddle, one of the plaintiffs in this cause," and inserting in lieu thereof the words "placed in the hands of Joseph Riddle, one of the plaintiffs in this cause." But the court refused leave to make the amendment. To which refusal the defendant excepted.

Afterwards, and after the court had pronounced judgment in the cause, the defendant moved the court for leave to file an amended plea, which was in

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all respects like the 2d plea, except that it averred that Riddle stated it to be the rule of the plaintiffs to take specialties for their debts if they could be obtained, and that the bond was delivered to Riddle in the *absence of the other plaintiff*, and except also that the conclusion was as follows: " and *so* the said defendant saith that the said writing, made and executed as aforesaid, was obtained by deception and fraud, *as aforesaid*, as to him the said Robert Moss, and, by reason of the *said* deception, is void as to him the said Robert Moss; and this he is ready to verify." But the court refused to suffer the plea to be filed, being of opinion that it would be bad upon demurrer. To this refusal also the defendant took a bill of exceptions.

C. Lee and *Swann*, for the plaintiff in error.

The plea of escrow was good. An instrument may be delivered to one of the parties as an escrow. *Pawling* v. *United States*, in this court.

It was not delivered to the plaintiffs, but to one of them only. It was not delivered absolutely, but upon condition that it should also be executed by another person also.

The plea of fraud also was good. It is not necessary to aver *fraud* in a plea. If the facts themselves show fraud, it is sufficient. Any thing that avoids the deed may be pleaded; and the conclusion, " *and so the said writing is void*," is proper and sufficient. It is not necessary to say it is not his deed. 2 *Wils.* 352. *Collins* v. *Blantern.*

E. J. Lee and *Jones*, contra.

An instrument cannot be delivered as an escrow to a party who is to derive benefit under the deed. It must always be to a stranger. *Shep. Touch.* 55, 56, 57. *Hob.* 246. 3 *Bac. Abr.* 320. 694. *Esp. N. P.* 221.

The 2d plea is not a plea of fraud. It is an at-

tempt to set up as a discount or set-off against a bond, an unliquidated claim for damages for breach of a promise.

The facts stated do not amount to fraud. Fraud consists in the intention, the *quo animo*, which is not averred in the plea; and fraud can never be presumed, especially if it be not averred. 1 *Vent.* 9. 210. 3 *Bac.* 320. 1 *Fonb.*

March 13.

MARSHALL, Ch. J. delivered the opinion of the court to the following effect:

It is admitted by the counsel in this case, that a bond cannot be delivered to the obligee *as an escrow*. But it is contended that where there are several obligees constituting a copartnership, it may be delivered as an escrow to one of the firm. The court, however, is of opinion that a delivery to one is a delivery to all. It can never be necessary to the validity of a bond that all the obligees should be convened together at the delivery.

Upon the other point the counsel for the plaintiff in error has insisted that the plea is sufficient.

But the court thinks it so radically defective as to be bad even upon general demurrer.

There is no allegation of fraud, and the circumstances pleaded do not, in themselves, amount to fraud.

Fraud consists in intention, and that intention is a fact which ought to have been averred, for it is the gist of the plea, and would have been traversable.

Upon what was the plaintiff below to take issue? Upon all the circumstances stated in the plea which are mere *inducement*, or upon the conclusion that "the bond is void?" If he had traversed the inducement, the issue would have been immaterial:

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if he had traversed the conclusion, it would have been putting in issue to the jury matter of law.

Judgment affirmed with costs.

C. Lee suggested that there was also an exception to the refusal of the court to allow an amended plea to be filed, after the court had adjudged the pleas bad.

But the *Chief Justice* said that the court had, in an early part of this term,* decided that such refusal was no error for which the judgment could be reversed.

* See the case of *Mandeville and Jamesson* v. *Wilson*, at this term, *ante*, *p.* 15.

BRENT *v.* CHAPMAN.

Five years' adverse possession of a slave in Virginia, gives a good title upon which trespass may be maintained.

ERROR to the circuit court for the district of Columbia, sitting at Alexandria, in an action of trespass brought by Chapman against Brent, marshal of the district of Columbia, for taking in execution, on a *fi. fa.* against the estate of Robert Alexander, deceased, a slave named Ben, who was claimed by Chapman as his property.

The jury found a verdict for the plaintiff, subject to the opinion of the court upon a statement of facts agreed by the parties, which was in substance as follows:

The slave was the property, and in possession of the late Robert Alexander the elder, at the time of his death. His sons, Robert Alexander, and Walter S. Alexander, were named executors of his will, but never qualified as such. On the 17th of December, 1803, Walter S. Alexander took out letters of administration with the will annexed. No division was

ever made, by the order of any court, of the personal estate of the deceased among his representatives; but previous to August, 1800, a parol division of the slaves was made between Robert Alexander the younger, and his brother, Walter S. Alexander, the latter being then under the age of twenty-one years. Robert Alexander the younger being possessed of the slave, and being taken upon an execution for a debt or debts due from himself in his individual character, in August, 1800, took the oath of insolvency under the laws of Virginia, and delivered up to the sheriff of Fairfax county, in that state, the slave as a part of his property included in his schedule. The sheriff sold him at public sale, and the plaintiff, knowing the slave to belong to the estate of the deceased Robert Alexander as aforesaid, became the purchaser for a valuable consideration, and took possession of the slave, and continued possessed of him under the sale and purchase until July, 1806. The plaintiff in the winter usually resided in Maryland, and in the summer in Virginia, on his farm, where he kept the slave, and has never resided in the district of Columbia.

Dunlop & Co. obtained judgment against Robert Alexander the younger, as executor of his father Robert Alexander, and, upon a *fieri facias* issued upon that judgment, the marshal seized and took the slave as part of the estate of the testator Robert Alexander, there being no other property belonging to his estate in the county which could have been levied except what Robert Alexander the younger had sold and disposed of for the purpose of paying his own debts. The agent of the creditors, Dunlop & Co., as well as the marshal, had notice, prior to the sale, that the plaintiff claimed the slave.

Upon this state of the case, the court below rendered judgment for the plaintiff according to the verdict. And the defendant brought his writ of error.

C. Lee, for the plaintiff in error, contended, that,

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under the circumstances of this case, five years' possession did not give a good title to Chapman. The possession was not adverse, for there was no administration upon the estate of Robert Alexander, sen. consequently no person legally competent to claim the possession. Besides, Chapman knew that the slave belonged to the estate of the testator.

This debt was a legal lien on the slave.

Robert Alexander, jun. could only transfer *his right* to the sheriff of Fairfax. The goods of the testator cannot be taken in execution for the debt of the executor. 4 *T. R.* 625. *Farr* v. *Newman.* Chapman could therefore only purchase the right of Robert Alexander, jun. in the slave.

The parol partition was void for the infancy of one of the parties. There was no executor qualified to assent to the legacy. By the law of Virginia, an executor cannot act until he has given bond. 1 *Cranch*, 259. *Fenwick* v. *Sears.* 3 *Cranch*, 319. *Ramsay* v. *Dixon.*

It is very doubtful whether five years' possession of a slave in Virginia, is itself a good title for a plaintiff. It may protect the possession of a defendant; and that is the only effect of the statute.

Swann, contra.

Robert Alexander the younger did not hold the slave as executor of his father's will, but under the legacy.

It is immaterial whether Chapman did or did not know that the slave belonged to the estate of the testator. Five years' possession by Chapman was a good title against all the world.

In England twenty years' possession is a good bar in ejectment, and it is also a good positive title in itself, upon which an ejectment may be maintained.

MARSHALL, Ch. J. Can an executor distribute the estate before he has qualified and obtained letters testamentary?

LIVINGSTON, J. In England, an executor, before probate, can do every thing but *declare*.

WASHINGTON, J. mentioned the case of *Burnley* v. *Lambert*, 1 *Wash.* 308. in which it was decided, by the court of appeals of Virginia, that, "after the assent of the executor, the legal property is completely vested in the legatee, and cannot be devested by the creditors."

March 13.

MARSHALL, Ch. J. delivered the opinion of the court to the following effect:

This court is of opinion that the possession of Chapman was a bar to the seizure of the slave by the marshal, under the execution stated in this case. The only objection of any weight was, that there was no administration upon the estate of Robert Alexander, sen. and, consequently, that the possession of Chapman was not an *adverse* possession.

But there was an executor competent to assent, and who did assent, to the legacy, and to the partition between the legatees, and who could not afterwards refuse to execute the will.

Judgment affirmed.

AULD *v.* NORWOOD.

If the owner of a slave permit her to remain in the

ERROR to the circuit court for the district of Columbia, sitting at Alexandria, in an action of detinue for a female slave named Eliza. Upon the

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possession of A. for 4 years, and A. then without the assent of the owner delivers her to B. who keeps her 4 years more, the possession of B. cannot be so connected with the possession of A. as to make it a fraudulent loan within the act of assembly of Virginia, in regard to B.'s creditors.

trial of the general issue in the court below, the plaintiff in error, who was defendant in that court, took a bill of exceptions, which stated that evidence was offered of the following facts: The slave, in November, 1798, was the property of *John Dabny*, against whom a *fieri facias* was issued at the suit of Norwood, the present defendant in error, upon which the slave was seized and sold by the proper officer; that one Charles Turner bought her for the said Norwood, and held her, as Norwood's property, until November, 1802, when he delivered her, without authority from Norwood, to one R. B. Jamesson, who held her until September, 1806, when he became insolvent under the insolvent act of the district of Columbia, and delivered her, as part of his property, to Auld, the plaintiff in error, who was appointed trustee under that act. This suit was commenced on the 19th of September, 1806.

Whereupon the plaintiff in error prayed the court to instruct the jury that if they found the facts to be as stated, the plaintiff below was not entitled to recover. And if the court should not think proper to give *that* instruction, that they would instruct the jury that the plaintiff's suffering the slave to remain out of his actual possession for so long a time was fraudulent in law as to the defendant. Which instructions the court refused to give, and the defendant *Auld* excepted. The verdict and judgment being against him, he brought his writ of error.

Swann, for the plaintiff in error, contended,

That it was to be considered as a loan of the slave to Turner; and that the possession of Jamesson, connected with that of Turner, made a period of more than *five* years, and, by the statute of frauds and perjuries of Virginia, (*P. P.* 16.) such possession transferred the property to the person in possession.

That statute declares that "where any *loan* of

goods and chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained by the space of five years, without demand made and pursued by due process of law on the part of the pretended lender," "the same shall be taken, as to the creditors and purchasers of the persons aforesaid so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession, unless such loan" "were declared by will, or by deed, in writing proved and recorded as aforesaid."

C. Lee and *E. J. Lee*, contra, contended,

That the possession of Jamesson, which was adverse to Norwood, could not be connected with Turner's possession, which was under Norwood, so as to make the case a fraudulent loan within the statute.

And of that opinion was the court.

Judgment affirmed.

SLACUM *v.* SIMMS AND WISE.

ERROR to the circuit court for the district of Columbia, sitting at Alexandria.

A magistrate who has received a deed of trust from an insolvent debtor, which deed is fraudulent in law as to creditors, is incompetent to sit as a magistrate in the discharge of the debtor under the insolvent law of Virginia. And the discharge so obtained is not

The former judgment of the court below having been reversed in this court at February term, 1806, *ante*, *vol.* 3. *p.* 300. and remanded for further proceedings, the following statement of facts, in the nature of a special verdict, was agreed upon by the parties.

That the defendants executed the bond in the declaration mentioned. That the defendant Simms, being in custody under the execution mentioned in

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a discharge in due course of law.

the condition of the bond, afterwards obtained his discharge as an insolvent debtor, by authority of the act of assembly of Virginia, entitled "An act for reducing into one the several acts concerning executions, and for the relief of insolvent debtors." That he was discharged from the prison bounds by warrant from Amos Alexander and Peter Wise, jun. two of the aldermen or justices of the corporation of Alexandria, before whom Simms delivered in a schedule of his estate, and took the oath of an insolvent debtor in the manner prescribed by the act, and being so discharged, he departed out of prison bounds, and not before, or in any other manner. That the defendant, Peter Wise, jun. is the same Peter Wise who acted as one of the justices, and who signed the warrant of discharge, and that Simms, before taking the oath, executed a deed conveying all his property, real and personal, to John Wise, and the said Peter Wise, in trust, for the benefit of the creditors of Simms, who, notwithstanding the said deed, afterwards, and after his discharge, exercised acts of ownership over the property. That Peter Wise never acted under the deed of trust. That the deed of trust was made by Simms with a view of preventing the effect of the plaintiff's execution, and was fraudulent in law, but such fraud was without the participation of the said Peter Wise; and without his privity, other than that the said deed was exhibited to the said magistrates, and discussed by counsel before them, at the time the schedule was delivered, and the oath administered.

That no escape warrant was ever applied for in consequence of Simms's departing from the prison bounds.

That if the law be for the plaintiff as to both defendants, or either of them, judgment to be entered for 2,570 dollars and 90 cents, to be discharged by the payment of 1,820 dollars and 20 cents, damages and costs against such defendant or defendants severally; but if the law be for either or both of the defendants,

then judgment to be entered for such defendant or defendants severally.

The schedule referred to in the statement, was as follows: "I have neither real or personal property, but what has been conveyed by a deed of trust to John Wise and Peter Wise, jun. for the use of my creditors, as will appear, reference being had to said deed.

(Signed) "*Jesse Simms.*

"August 30th, 1800."

The court below decided the law for both defendants; and the plaintiff sued out his writ of error.

Swann, for the plaintiff in error.

The case now presented is different from what it formerly was. It will now be contended that Simms was not discharged by due course of law.

1. Because Simms was guilty of fraud in effecting his discharge, and Wise knew it; and, by his conduct, contributed to assist him in it. Fraud is a question of law and fact. It is not necessary that it should be expressly averred. It is an inference of law from the facts. *Russel* v. *Hamilton*, 1 *Cranch*, 309. 1 *Burr.* 396. 474. 3 *Co.* 77. 79. *Fenner's case. Esp. N. P.* 245. *Buller*, 173.

2. Because Wise was not competent to act as a magistrate in discharging Simms. He was directly interested; for by discharging Simms he discharged himself from the obligation of his bond. An interested person is not competent to act as a judge. 12 *Mod.* 669. *Wood's case. Com. Dig.* tit. *Justices*, *I.* 3.

The defendant must show all the proceedings to be regular and correct. It is not like the case of a

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judgment of a competent court, which will be affirmed unless the error be apparent on the proceedings.

The proceedings are *in pais*, there can be no writ of error. This is the only mode in which the procedure can be corrected.

C. Lee and *Jones*, contra.

Fraud is never to be presumed; and it is not found. It was a mere ministerial act, which is not void by reason of interest.

This is not the mode by which the plaintiff can avail himself of the fraud, if it be one. The discharge is *prima facie* good.

It is expressly found that Wise did not participate in the fraud which Simms contemplated by his deed. He never acted under the deed as a trustee. His only knowledge of the fact was in his capacity of magistrate. As a magistrate he had no discretion; he was bound to grant the warrant of discharge upon the debtor's taking the oath, and delivering the schedule.

All the authorities cited in Comyns' Digest confine the incompetence to cases where the judge is *a party* upon record.

If a legal proceeding of this kind may be vacated at any subsequent time, by showing a remote collateral interest in the magistrate, there can be no security for property. The distinction is between a direct interest as party, and a consequential interest. If the interest do not appear upon the record, the only remedy is by prohibition. As long as the proceeding remains unreversed by a competent tribunal, it is valid. *Hard.* 503. *Brooks* v. *Earl of Rivers.* 12 *Co.* 114. *Earl of Darby's case. Dyer*, 220. a. *Sir N. Bacon's case.* 1 *Leon.* 184. *Cro. Eliz.* 717. *Errish* v. *Reeves.* 8 *Co.* 118. *Bonham's case. Co. Litt.* 141. 4 *Com. Dig.* tit. *Justices, I. & T.* 1 *Salk.* 398. 12 *Mod.* 587. 2 *Salk.*

425. *Queen* v. *Rodgers*. 2 *Salk*. 607. *Sty*. 137. *Smith* v. *Hancock*. *Sty*. 209.

Swann, in reply.

It is immaterial whether it be a ministerial or a judicial act. Sheriffs, witnesses, jurors are all rendered incompetent by interest; and *à fortiori* is a judge.

March 15.

MARSHALL, Ch. J. delivered the opinion of the court to the following effect:

The former case between these parties presented the single circumstance of fraud in Simms, the principal debtor, in which Wise had no share as it was then stated.

The decision in that case does not affect the present. It is here stated that the defendant Wise was one of the magistrates who granted the discharge, and who received a conveyance from Simms of all his estate, &c.

It cannot be doubted that if there had been a combination between the surety of the insolvent and the magistrate to grant the discharge, such surety could never plead that discharge in bar of this action. Such would have been the law if Peter Wise the surety had been a different person from Peter Wise the magistrate. But being the same person, he is clearly incompetent. He is directly interested, and his interest appears upon the record.

But the case is stronger when we consider the irregularity of the schedule of property delivered by Simms at the time of his discharge.

The whole schedule is in these words: "I have neither real or personal property, but what has been conveyed by a deed of trust to John Wise and Peter

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Wise, jun. for the use of my creditors, as will appear, reference being had to the said deed."

He does not directly affirm that it is, or is not, his property. He might have taken the oath although he knew that the property contained in the deed remained in himself. The schedule, therefore, was not such as the law requires. The transaction is fraudulent upon the face of it.

The discharge, being granted by an incompetent tribunal, is wholly void.

Judgment reversed.

THE UNITED STATES *v.* VOWELL AND M'CLEAN.

Duties upon goods imported, do not accrue until their arrival at the *port of entry*.

The duty upon salt, which ceased with the 31st of December, 1807, was not chargeable upon a cargo which arrived within the collection district before that day, but did not arrive at the port of entry until the 1st of January, 1808.

ERROR to the circuit court of the United States, for the district of Columbia, in an action of debt upon a bond given by the defendants in error to the United States, for duties on a cargo of *salt* from St. Ubes, which arrived and came to anchor within the collection district of Alexandria, *sixteen miles below the town and port of Alexandria*, on the 23*d of December*, 1807, but did not arrive at the *port* of Alexandria until the *first of January*, 1808.

The collector of Alexandria refused to permit the cargo to be landed until the duties were secured. Vowell contended that the salt was not subject to duty.

The facts being specially pleaded, and admitted in the replication, to which there was a general demurrer, the only question was, whether, as the duty upon salt ceased with the 31st of December, 1807, this cargo, which arrived within the *district*, but not

at the port of Alexandria before the 1st of January, 1808, was liable to duty.

The court below was of opinion that it was not, and rendered judgment for the defendants, upon the demurrer.

The United States brought their writ of error.

Jones, for the United States.

The duty attached when the salt was imported into the district, and, perhaps, when brought into the United States.

By the act of the 10th of August, 1790, *vol.* 1. *p.* 248. a duty of 12 cents a bushel is laid upon salt which, after the 31st of December then next, should be "*brought into the United States*, from any foreign port or place." So by the act of the 8*th July*, 1797, *vol.* 4. *p.* 35. an additional duty of 8 cents is laid upon all salt *imported into the United States*. By the act of March 3, 1807, *vol.* 8. *p.* 290. it is enacted, "that from and after the 31st day of December next, so much of any act as lays a duty upon imported salt, be and the same is hereby repealed; and from and after the day last aforesaid, salt shall be imported into the United States free of duty: Provided that for the recovery and receipt of such duties as shall have accrued, and on the days aforesaid respectively remain outstanding, and for the recovery and distribution of fines, penalties and forfeitures, and the remission thereof, which shall have been incurred before and on the said days respectively, the provisions of the aforesaid act shall remain in full force and virtue."

The laws of the United States take a distinction between *importing* and *entering*, between a *port* and a *place*. *Vol.* 4. *p.* 317. § 23. and 24. Goods may be imported before they are entered or delivered. So if goods are brought in and destined to be delivered in different districts or ports, they are to be inserted

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in the manifest in successive order, and the law speaks of them as *imported*. The forfeiture for want of a manifest does not accrue at the time of *entry*, but at the time of *importing* or *bringing in*. So if goods are brought into the United States, to be exported again to foreign ports, the law speaks of them as *imported*, (*vol.* 4. *p.* 331, 332. § 32.) although they are not intended to be landed.

In *vol.* 4. *p.* 327. § 30. is the following expression: "at any *port* of the United States established by law, or within any *harbour*, *inlet* or *creek thereof*;" which shows that a *port* established by law, is coextensive with a collection district.

C. Lee, contra.

Until the vessel arrives at the port of entry, neither the duties on the goods, nor on the tonnage, accrue. Yet they both accrue at the same time.

The question is, what is the fiscal meaning of the word imported.

The first collection law, which was passed on the 4th of July, 1789, (*Child's edit. Laws*, *vol.* 1. *p.* 25.) has the same expression, imported into the United States. Yet it afterwards speaks of the *time* of importation, where it evidently means the time when a permit is applied for at the proper office. Some rule is necessary by which to fix the time of importation; it ought not to depend upon the question at what time the vessel arrived within the jurisdiction of the United States. The same act, when speaking of the *ad valorem* duties, refers to the *time and place* of importation, for the purpose of ascertaining the value.

If goods should be lost after arrival within the collection district, but before they reached the *port of entry*, no duties would accrue upon them. So if they are damaged, the value is to be ascertained not

at their arrival within the district, but at the port of entry.

The second collection law, *vol.* 1. *p.* 248. (*Folwell's edition*,) does not repeal the first, except so far as it is repugnant thereto, but is explained by it.

The duty on tonnage does not accrue until the arrival at the port of entry.

In the act of May 2, 1792, *vol.* 2. *p.* 68. the duties therein mentioned are to be "laid, levied and collected upon the said articles *at their importation into the United States*."

The acts of congress take a clear distinction between a district and a port. A district may contain several ports. *Vol.* 1. *p.* 162.

The case of a vessel detained by ice, is the only case in which an entry of a vessel within the district can be made before her arrival at the port of entry.

By the collection act, in *vol.* 1. *p.* 175. the district of Alexandria is created, and a collector is to reside at *Alexandria*, which is made the sole port of entry; "and the authority of the officers of the said district shall extend over all the waters, shores, bays, harbours and inlets, on the south side of the river Potomack from the last-mentioned *cockpit point* to the highest tide water of the said river."

If *district* meant *port*, a vessel must enter within 48 hours after arrival within the district, or the vessel and cargo will be liable to forfeiture.

Six months' credit is given for duties from the time of importation. The uniform construction of the treasury has been that this six months begins from the time of entry and permit. In this very case the bond is dated on the 2d of January, 1808, the date of the permit.

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In all cases too where additional duties have been imposed, the construction of the treasury has always been, that the additional duties are to be paid if the vessel arrived at the *port* after the day fixed by law, although she arrived within the *district* before that day.

March 15.

MARSHALL, Ch. J. delivered the opinion of the court to the following effect:

The distinction taken by the counsel for the defendants in error, between a district and a port of entry, is correct. The duties did not accrue in the fiscal sense of the term, until the vessel arrived at the port of entry. If the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions. It is understood that in case of an increase of duty, the United States have always demanded and received the additional duty if the goods have not arrived at the *port of entry* before the time fixed for the commencement of such additional duty, although the vessel may have arrived within the collection district before that time. The same rule of construction is to be observed when there is a diminution of duty.

Judgment affirmed.

SLOOP SALLY *v.* THE UNITED STATES.

An appeal from the district court of the district of Maine, in a case of admiralty jurisdiction.

THIS was an appeal from the sentence of the district court for the district of *Maine*, condemning the sloop Sally and cargo for violation of the revenue laws of the United States. The appeal was directly to this court.

Rodney, Attorney-General.

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No appeal lies from that court directly to this in a case where that court acts in the capacity of a *district* court. In such cases the appeal is expressly given to the circuit court for the district of Massachusetts.

tion, does not lie directly to the supreme court of the United States, but to the circuit court for the district of Masschusetts.

In all cases where the district court of Maine acts as a *district* court, the appeal is to the circuit court for the district of Massachusetts.

By the 10th section of the judiciary act of 1789, *vol.* 1. *p.* 54. it is enacted that the "district court in *Maine* district, shall, besides the jurisdiction herein before granted, have jurisdiction of all causes (except of appeals and writs of error) herein after made cognisable in a circuit court, and shall proceed therein, in the same manner as a circuit court; and *writs of error* shall lie from decisions therein, to the circuit court in the *district of Massachusetts*, in the same manner as from other district courts to their respective circuit courts." And by the 21st section it is enacted, "that from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an *appeal* shall be allowed to the next circuit court to be held in such district. *Provided nevertheless*, that all *such* appeals from final decrees *as aforesaid*, from the district court *of Maine*, shall be made to the *circuit court*, next to be holden after each appeal, in the *district of Massachusetts*."

By the act of March 3d, 1803, *vol.* 6. *p.* 315. § 2. it is enacted, "that from all final judgments or decrees rendered or to be rendered in any circuit court, or in any district court, *acting as a circuit court*, in any cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars, shall be allowed to the supreme court of the United States," &c.

In this case the court below could only act in its capacity of a district court, because such causes of

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admiralty and maritime jurisdiction are *exclusively* cognisable in a district court.

C. Lee, contra, contended, that there was a repugnance between the act of 1789, and that of 1803, the latter declaring that appeals in such cases should be directly to the supreme court.

But the Court was of opinion that this not being a case where the district court was acting as a circuit court, the appeal ought to have been to the circuit court of Massachusetts.

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15. See *British Treaty*, 344
16. An appeal from the district court of the United States for the district of Maine, in a case of admiralty jurisdiction, does not lie *directly* to the supreme court of the United States, but to the circuit court for the district of Massachusetts. *Sloop Sally* v. *United States*, 372
17. In all cases in which the district court of Maine acts as a district court, the appeal is to the circuit court for the district of Massachusetts. *Id. ib.*

K

KENTUCKY.

1. See *Jurisdiction*, 10. 191
2. Entries of land in Kentucky must have that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on the adjacent residuum. *Bodley* v. *Taylor*, 191
3. Distance upon a road is to be computed by the meanders, and not by a straight line. *Id. ib.*
4. If the entry be of a *settlement and*

pre-emption right on the east side of a road, the 400 acres allowed for the *settlement right* must be surveyed entirely on the east side of the road, and in the form of a square. *Bodley* v. *Taylor*, 192

5. The call for the *settlement right* is sufficiently certain, but the call for the *pre-emption right* is too vague, and must be rejected. *Id.* *ib.*
6. A defendant in equity who has obtained a patent for land not included in his entry, but covered by the complainants' entry, will be decreed to convey it to the complainants; but the complainants will not be required to convey to the defendant the land which they have obtained a patent for, which was covered by the defendant's entry, but which, by mistake, he omitted to survey. *Id.* *ib.*

L

LANDS.

1. See *Deeds*, 1, 2, 3, 4. 22. 154
2. Lands included in the *Zaneville* district in the state of Ohio, by the act of the 3d of March, 1803, could not, after that date, be sold at the *Marietta* land-office. *Matthews* v. *Zane*, 92
3. See *Kentucky*, 2, 3, 4, 5, 6. 191
4. See *Evidence*, 3. 262
5. See *Equity*, 4, 5, 6, 7, 8, 9, 10. 262
6. The certificate of survey is sufficient evidence that the warrant was in the hands of the surveyor. *Taylor* v. *Brown*, 234
7. That clause of the land law of *Virginia*, which requires the survey to be recorded within two months after it was made, is merely *directory* to the surveyor; and his neglect to record it does not invalidate the survey. *Id.* 235
8. It is not necessary that the deputy surveyor who made the survey, should make out the plat and certify it. It may be done from his notes by the principal surveyor. *Id.* *ib.*
9. A survey is not void because it includes more land than was directed to be surveyed by the warrant. *Id.* *ib.*
10. The locator of a warrant, under the law of *Virginia*, undertakes himself to find *waste* and *unappropriated* land, and his patent issues upon his own information to the government, and at his own risk. He cannot be considered as a purchaser without notice. *Taylor* v. *Brown*, 236
11. The equity of the prior locator extends to the *surplus* land surveyed, as well as to the quantity mentioned in the warrant. *Id.* *ib.*

LAW OF NATIONS.

A vessel, sailing ignorantly for a blockaded port, is not liable to capture under the law of nations. *Yeaton* v. *Fry*, 335

LIMITATIONS.

1. See *Account*, 1, 2, 3, 4. 15
2. Five years' adverse possession of a slave, in Virginia, gives a good title upon which trespass may be maintained. *Brent* v. *Chapman*, 358

M

MAGISTRATE.

See *Judge*, 363

MAINE.

See *Jurisdiction*, 1. 16, 17. 1. 373

MARRIAGE SETTLEMENT.

See *Deeds*, 3, 4. 154

MANDAMUS.

A *mandamus* will go to a district judge to cause his sentence to be executed, although a state legislature should declare that sentence void. *United States* v. *Judge Peters*, 115

MISREPRESENTATION.

See *Insurance*, 4, 5. 100

N

NEW JERSEY.

See *Jurisdiction*, 8. 173

NEW TRIAL.

See *Error*, 2. 6, 7. 11. 187. 280

NONSUIT.

See *Error*, 7. 180

O

OHIO.

See *Zaneville*, 92

OYER.

The want of oyer of the condition of a bond, in a plea of performance, is fatal. *United States* v. *Arthur*, 257

P

PARTNERS.

1. An assignment by one partner, in the name of the copartnership, of the partnership effects and credits, is valid. *Harrison* v. *Sterry*, 289
2. Under a separate commission of bankruptcy against one partner, only his interest in the joint effects passes. *Id.* *ib.*

PATENT.

1. See *Equity*, 5, 6. 234
2. See *Jurisdiction*, 10. 191
3. See *Kentucky*, 6. 192

PAYMENT.

Upon the plea of payment to an action of debt upon a bond for the payment of 500 dollars, evidence may be received of the payment of a smaller sum, with an acknowledgment by the plaintiff, that it was in full of all demands; and from such evidence, if uncontradicted, the jury ought to infer payment of the whole. *Henderson* v. *Moore*, 11

PENNSYLVANIA.

See *Deeds*, 1, 2. 22

PERFORMANCE, SPECIFIC.

See *Equity*, 9, 10. 262

PLEADING.

1. See *Payment*, 11
2. See *Plene Aaministravit*, 19
3. See *Oyer*, 257
4. See *Demurrer*, 2. 257

PLENE ADMINISTRAVIT.

Upon the issue of *plene administravit*, the jury must find specially the amount of assets in the hands of the executor, otherwise the court cannot render judgment upon the verdict. *Fairfax* v. *Fairfax*, 19

POSSESSION.

1. See *Limitation*, 2. 358
2. See *Fraud*, 3. 361

PRACTICE.

1. See *Error*, 1. 1
2. See *Alexandria*, 3. 2
3. See *Error*, 2. 11
4. See *Jurisdiction*, 2. 13
5. See *Plene Administravit*, 19
6. See *Citation*, 1. 19
7. See *Insurance*, 6. 100
8. See *Deposition*, 1. 187
9. See *Error*, 6. 187
10. See *Oyer*, 257

11. See *Demurrer*, 1, 2. 15. 257
12. See *Error*, 7. 280
13. See *Jurisdiction*, 11. 287
14. See *Error*, 8. 289
15. See *Admiralty*, 4, 5. 313
16. See *Citation*, 2. 321

PROBABLE CAUSE.

See *Duties*, 3. 311

PROMISSORY NOTES.

1. See *Bank of Alexandria*, 1, 2. 45. 49
2. See *Endorsement*.
3. See *Accommodation*.
4. See *Consideration*.

R

REVENUE.

1. See *Copper*. 284
2. See *Jurisdiction*, 14. 304
3. See *Duties*, 2, 3, 4, 5 311. 368

S

SALT.

See *Duties*, 5. 368

SEIZURE.

1. See *Jurisdiction*, 14. 304
2. See *Duties*, 3. 311

SENTENCE.

See *Admiralty*, 1, 2, 3. 281

SET-OFF.

See *Bankrupt*, 1. 34

SLAVE.

1. See *Limitation*, 2. 358
2. See *Fraud*, 3. 362

SPECIFIC PERFORMANCE.

See *Equity*, 9, 10. 262

STATE.

See *Jurisdiction*, 5. 115

STATUTES.

See *Construction of Statutes*. 22

SUBSCRIBING WITNESS.

See *Evidence*, 1. 13

SURVEY.

1. See *Equity*, 4, 5, 6. 234
2. See *Lands*, 6, 7, 8, 9, 10, 11. 234

T

TAXES.

See *Alexandria*. 1

TREASON.

See *Jurisdiction*, 8. 173

TRESPASS.

Five years' adverse possession of a slave in Virginia, gives a good title upon which trespass may be maintained. *Brent* v. *Chapman*, 358

TRIAL.

See *Bank of Alexandria*, 1. 45

TRIAL, NEW.

See *Error*, 2. 6, 7. 11. 187

U

UNITED STATES.

In the distribution of a bankrupt's effects in this country, the United States are entitled to a preference,

although the debt was contracted by a foreigner in a foreign country; and although the United States had proved their debt under the commission of bankruptcy, and had voted for an assignee. *Harrison* v. *Sterry*, 289

V

VENDOR.

See *Equity*, 9, 10. 262

VERDICT.

See *Plene Administravit*. 19

VESSELS.

See *Jurisdiction*, 14. 304

VIRGINIA.

1 See *Bank of Alexandria*, 2. 49
2. See *Endorsement*, 2, 3, 4, 5, 6, 7. 9. 11.
3. See *Deeds*, 3, 4. 154
4 See *Equity*, 4. 5, 6, 7. 234
5. See *Lands*, 6, 7, 8, 9, 10, 11. 234
6. See *Trespass*. 358
7 See *Fraud*, 3. 361
8. See *Insolvent*. 363

W

WARRANTY.

See *Insurance*, 2. 10

WITNESS.

See *Evidence*, 1. 13

Z

ZANEVILLE.

The lands included within the *Zaneville district*, by the act of the 3d of March, 1803, could not, after that date, be sold at the *Marietta* land-office. *Matthews* v. *Zane*, 92

END OF THE FIFTH VOLUME.